Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

DATE	PROCEEDINGS
Aug. 19, 1968	Filed Complaint and issued summons.
April 17, 1968	Filed defendant Bankers, Life Motion for Summary Judgment.
June 19, 1968	Memo Endorsed on motion filed 4-17-68. Motion for summary judgment is denied without prejudice, until the question of the jurisdiction of this Court to act over it is determined by appropriate direct hearing on deft's challenge to the jurisdiction of this Court. So ordered — Ryan, J.
July 10, 1968	Filed defts — Belgian — American Banking & Trust Co. — affidavit & Notice of motion for judgment on the pleadings.
July 15, 1968	Filed deft. Bankers Life & Casualty Company notice of motion to dismiss.
September 6, 1968	Defts (Garvin, Bantel & Co.) affidavit & Notice of motion for judgment on the pleadings, etc.
September 10, 1968	Deft's (Irving Trust Co.) Notice of motion to dismiss complaint.
June 3, 1969	Opinion # 35912 — The Court dismisses the complaint as to the movants & hereby directs that judgment be entered for movants. So ordered. Herlands, J.
June 4, 1969	Judgment — Defts, Bankers Life & Casualty Co., Belgian American Banking Corp. & Belgian American Bank & Trust Co., have judgment against the pltff., Superintendent of Insurance of

Relevant Docket Entries

Date	Proceedings
	the State of N.Y., as Liquidator of Manhattan Casualty Co., dismissing the complaint as to them. Herlands, J.
June 9, 1969	Filed Memo Endorsed on defts Garvin, et ano's motion for judgment on the pleadings, etc. filed 9-6-68. Motions to dismiss are granted without prejudice to prosecution of the action pltff filed & is pending in the Supreme Court, County of New York.
June 9, 1969	Filed Memo Endorsed on deft (Irving Trust) motion filed 9-10-68 — motions to dismiss are granted without prejudice to prosecution of the action pltff filed and is pending in the Supreme Court, County of N.Y.
June 16, 1969	Filed Notice of settlement & order that the Clerk enter judgment against the pltff the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Co., dismissing the complaint against deft., Irving Trust Co., for lack of jurisdiction & that the dismissal of the complaint is without prejudice to the prosecution of the action that Supt. of Insurance, etc. has commenced in the Supreme Court, County of N.Y., Ryan, J.
June 23, 1969	Filed Notice of Settlement & Order that the clerk enter judgment against pltff. dismissing the complaint against defts Garvin, Bantel & Co., and George K. Garvin for lack of jurisdiction & that motion to dismiss is granted without prejudice to the prosecution of the action pltff has commenced in the Supreme Court, County of N.Y. — Ryan, J. Judgment ent.

Complaint

[SAME TITLE]

Plaintiff, by his attorney, Arnold Bauman, as and for his complaint herein respectfully alleges:

1. This action is based on violations of Section 17A of the Securities Act of 1933 (15 U.S.C.A. § 77q(a)). This Court has jurisdiction under Section 22(a) of the same Act (15 U.S.C.A. §77(v)).

2. Plaintiff Thomas Thacher is Superintendent of Insurance of the State of New York. On May 24, 1963 by order of the Supreme Court of the State of New York, plaintiff, as said Superintendent of Insurance, was appointed Liquidator of Manhattan Casualty Company. As Liquidator, he is vested with title to all property, contracts and rights of action of Manhattan Casualty Company.

3. Defendant, Bankers Life and Casualty Company (hereinafter referred to as "Bankers Life"), is a corporation organized and existing under the laws of the State of Illinois.

4. Defendant, Irving Trust Company (hereinafter referred to as "Irving Trust"), is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1 Wall Street, City and State of New York.

5. Defendant, Belgian American Banking Corporation (hereinafter referred to as "BA Banking"), is a corporation organized and existing under the laws of the State

of New York, with its principal place of business at 52 Wall Street, City and State of New York.

6. Defendant, Belgian American Bank and Trust Company (hereinafter referred to as "BA Trust"), is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 52 Wall Street, City and State of New York.

7. Defendant, Garvin, Bantel & Company (hereinafter referred to as "Garvin, Bantel"), is a partnership engaged in the transaction of business within the State of New York, with its principal place of business at 120 Broadway, City and State of New York.

8. Defendant, New England Note Corporation (hereinafter referred to as "New England Note"), formerly New England Acceptance Co., Inc., is a corporation organized and existing under the laws of the State of Massachusetts.

9. Defendant, George K. Garvin (hereinafter referred to as "Garvin"), is a resident and citizen of the State of New York and a partner in Garvin, Bantel.

10. Defendant, James F. Begole (hereinafter referred to as "Begole"), is a resident and citizen of the State of New York.

11. Defendant, John F. Sweeny (hereinafter referred to as "Sweeny"), is a resident and citizen of the State of New Jersey.

12. Defndant, Standish T. Bourne (hereinafter referred to as "Bourne"), is a resident and citizen of the State of Massachusetts.

Complaint

Plaintiff Alleges Against All Defendants, Upon Information and Belief:

13. Manhattan Casualty Company (hereinafter referred to as "Manhattan"), was incorporated under the laws of the State of New York on January 13, 1949 and commenced business on June 1, 1949. It was authorized as of May 23, 1963 to transact the following kinds of insurance business as defined in Section 46 of the Insurance Law of the State of New York: accident and health, fire, miscellaneous property, water damage, burglary and theft, glass, elevator, collision, personal injury liability, property damage liability, workmen's compensation and employers' liability, fidelity and surety, motor vehicle and aircraft and marine insurance (excluding ocean marine insurance and insurance against loss or damage by reason of injury to the person). In addition, respondent was authorized by the United States Department of Labor to write compensation insurance provided under the Federal Longshoremen's and Harbor Workers' Compensation Act.

14. As of December 31, 1962, Manhattan was authorized to transact business in the States of Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia.

15. During all the times hereinafter referred to, Manhattan had its principal office at No. 116 John Street, City and State of New York.

16. On May 24, 1963 the corporate charter of Manhattan was forfeited, surrendered and annulled and Manhattan

was dissolved by order of the Supreme Court of the State of New York, held in and for the County of New York (Honorable Peter A. Quinn, Justice).

17. In November, 1961 Bankers Life was the owner of all of the outstanding shares of Manhattan. The shares so outstanding consisted of 100,000 shares of prior preferred stock, 10,000 shares of preferred stock and 180,000 shares of common stock.

18. Commencing in or about November, 1962, in connection with and in furtherance of the sale of said shares, the defendants and/or their officers, agents and representatives employed a device, scheme and artifice to defraud Manhattan by use, means and instrumentalities of transportation and communication in interstate commerce and/or the mails.

19. Between November, 1961 and January 19, 1962, Bourne and Begole negotiated for the purchase of said outstanding shares of Manhattan with Sweeny, James W. Bourland (hereinafter referred to as "Bourland"), Vice President of Bankers Life, and others.

20. On January 19, 1962 a contract of sale for the said shares was entered into between Begole, as purchaser, and Bankers Life, as seller, of the shares of Manhattan. It provided that the price to be paid Bankers Life was $5,000,000, by bank or certified check, which was to be delivered at the closing on January 24, 1962. The contract was executed for Bankers Life by Bourland, as Vice President; for Manhattan by Bourland, as Executive Vice President, and by Begole.

21. Between January 19, 1962 and January 24, 1962, Bourne stated to Begole that he would provide Begole with the funds necessary to effect the transaction.

22. During this period, for the purpose of concealing the said scheme to defraud, Bourne asked Garvin if he could arrange with a bank to issue $5,000,000 in certificates of deposit and to obtain a loan on those certificates in that amount.

23. Garvin, in furtherance of said scheme, thereupon arranged with BA Trust to issue a certificate of deposit for $5,000,000 in the name of Manhattan. He also arranged with BA Banking to loan $5,000,000 to New England Note upon the security of the certificate of deposit to be issued in the name of Manhattan.

24. On January 23, 1962 Garvin asked C. Joseph Gunter (hereinafter referred to as "Gunter"), Assistant Secretary of Irving Trust, to appear at his office next morning with a check of Irving Trust for $5,000,000, payable to Bankers Life. Garvin told Gunter that the money for the transaction would be provided by the delivery of securities from Chemical Bank New York Trust Company.

25. On January 24, 1962 Gunter appeared at Garvin's office. Begole, who was present, executed two notes totalling $5,250,000, payable to New England Note, in the presence of Bourne, Sweeny, Gunter and Garvin. One of these notes was in the sum of $5,000,000 and bore interest at 7½ percent; the other was in the amount of $250,000 and bore interest at 5 percent. Begole also executed an assignment of the shares of Manhattan of which he was not yet the owner to New England Note.

26. Later that morning, Begole, Sweeny, Garvin and Gunter appeared at the office of Manhattan. Gunter turned over the Irving Trust check for $5,000,000, payable to Bankers Life, to Leo Lehane, Executive Vice President of that company. In return, Gunter was handed an unsealed envelope, the contents of which he did not examine.

27. Shortly thereafter, on January 24, 1962, $5,155,000 in United States Government securities, the property of Manhattan, were transferred through Garvin, Bantel to Irving Trust. They were sold that day to Second District Securities Company for the account of Manhattan by Garvin, Bantel and delivered by Irving Trust to the purchaser. The proceeds of $4,854,552.67 together with other transfers of cash were credited to an account in the name of Manhattan at Irving Trust. The $5,000,000 payment to Bankers Life by Irving Trust was charged against these funds.

28. Later that day, at the request of Garvin, Bantel, Gunter brought to the offices of BA Trust another check of Irving Trust in the amount of $5,000,000 payable to the order of BA Trust. There, he delivered it to Sweeny who turned it over to BA Trust which thereupon issued a certificate of deposit for $5,000,000, payable in six months, accepting the Irving Trust check in payment. Sweeny, as President of Manhattan, endorsed the certificate of deposit to New England Note. Bourne, as President of New England Note, endorsed the certificate of deposit over to BA Banking as collateral security on a six month loan of $5,000,000 made by BA Banking to New England Note. A check of BA Banking in the sum of $5,000,000 was then turned over to Gunter. At the same time BA Banking made another loan to New England Note in the sum of $250,000,

which was secured by the aforementioned outstanding shares of Manhattan. This sum was deposited by New England Note in BA Trust and was disbursed, in part, as follows: Garvin, Bantel—$25,000; Begole—$50,000; Bourne—$50,000; BA Banking—$100,000.

29. All of the actions referred to in paragraphs 27 and 28 were taken with the purpose of concealing the fact that the assets of Manhattan had been reduced by the value of the United States Government securities above referred to, that Bankers Life had been paid the sum of $5,000,000 out of the assets of Manhattan for the sale of the aforementioned outstanding stock of Manhattan, and that Begole had become the ostensible owner of said stock without any cash investment.

30. Until 5:05 P.M. on January 24, 1962, Manhattan had no account at Irving Trust.

31. Between January 24 and January 29, 1962, a series of entries were made on the books of Irving Trust for the purpose of concealing the above transactions.

32. For the purpose of concealing the above transactions, on January 29, 1962 Garvin, at the request of Irving Trust, obtained backdated letters signed by Bourne.

33. On July 24, 1962 the aforementioned certificate of deposit, the alleged loans made by BA Banking to New England Note, and the alleged loans made by New England Note to Begole, all matured. As part of the scheme to defraud and in furtherance thereof, BA Trust issued a new certificate of deposit in the amount of $5,000,000, payable January 24, 1963. This was endorsed by Sweeny, as Treas-

urer, and Begole, as Chairman, of Manhattan. The Begole and New England Note loans were extended to January 24, 1963. On July 24, 1962 Begole, as Chairman of Manhattan, advised BA Trust that in consideration of BA Banking's loan to New England Note it was providing collateral of the $5,000,000 certificate of deposit issued by BA Trust and all of its outstanding shares.

34. On August 30, 1962 Sweeny, as President of Manhattan, wrote BA Trust letters (1) indicating that he was forwarding a non-negotiable certificate of deposit in the amount of $5,000,000 issued by BA Trust and a non-negotiable certificate of deposit in the sum of $500,000 issued by the First National Bank of Boston, (2) requesting BA Trust to hold the $5,000,000 certificate of deposit and, upon maturity, to place that sum in Manhattan's current account with that institution, and (3) requesting BA Trust to hold the $500,000 certificate of deposit for safekeeping and in trust. Said letters were written for the purpose of concealing the reduction of Manhattan's assets by the sale of the United States Government securities referred to in paragraph 27 hereof and for the further purpose of creating the misleading impression that Manhattan's unencumbered assets totalled $5,500,000 more than they in fact did.

35. In mid-January, 1963 it appeared that—

(a) BA Trust owed $5,000,000 plus interest to Manhattan, evidenced by a certificate of deposit.

(b) Manhattan had on deposit at BA Trust a sum in excess of $500,000.

(c) New England Note owed BA Banking $5,250,000 plus interest, which loan BA Banking refused to renew.

36. About January 20, 1963 Bourne asked Garvin, Bantel to arrange to place $5,500,000 in the account of Manhattan upon which certificates of deposit would issue. On January 21, 1963 Begole requested Irving Trust to issue certificates of deposit aggregating $5,500,000 and directed that they be delivered to Garvin, Bantel. Marine Midland allegedly loaned Garvin, Bantel $5,500,000 which was delivered to Irving Trust. The foregoing was done for the purposes set forth in paragraph 34 hereof and was in furtherance of the aforesaid scheme to defraud.

37. On January 25, 1963 BA Trust credited Manhattan with $5,075,616.44, the proceeds of the BA Trust certificate of deposit payable to Manhattan, as well as $515,361.18, the proceeds of another such certificate issued by the First National Bank of Boston payable to Manhattan. At the direction of Manhattan, BA Trust issued its check to Irving Trust in the sum of $5,500,000 and charged Manhattan's account. Irving Trust issued its check to BA Banking in the sum of $5,250,000. BA Banking applied the Irving Trust check in payment of the alleged New England Note loans. The two checks described in this paragraph were exchanged between BA Banking, BA Trust and Irving Trust at a meeting held that day at the office of BA Banking and/or BA Trust. The foregoing was done for the purposes described in paragraph 34 hereof.

38. On April 18, 1963 BA Banking delivered to Begole and Sweeny the shares of stock of Manhattan registered in the name of Begole.

39. For the purposes set forth in paragraph 34 hereof, on May 15, 1963 Irving Trust certified to the New York State Insurance Department that Manhattan had on de-

posit at Irving Trust the sum of $5,500,000 evidenced by the certificates of deposit described in paragraph 36 hereof and further certified that said certificates were free of all liens, claims, or incumbrances, and were not held as security for any loan.

40. The foregoing transactions constituted violations of Section 17A of the Securities Act of 1933 (15 U.S.C.A. § 77q(a)) and caused Manhattan to suffer damages in an amount in excess of $5,500,000.

WHEREFORE, plaintiff demands judgment against defendants Bankers Life and Casualty Company, Irving Trust Company, Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin, Bantel & Company, New England Note Corporation, George K. Garvin, James F. Begole, John F. Sweeny and Standish T. Bourne, jointly and severally, for $5,500,000 with interest from the 24th day of January, 1962, together with the costs and disbursements of this action, and for such other, further or different relief as to the Court may seem just and proper.

Dated: New York, New York,
August 15, 1963.

Answer, Bankers Life and Casualty Company

[SAME TITLE]

Defendant BANKERS LIFE AND CASUALTY COMPANY ("Bankers Life"), an Illinois insurance corporation, by its attorneys Jacobs Persinger & Parker, answering the complaint herein:

First: Denies each and every allegation contained in Paragraph "1" of the complaint, except admits that the complaint in this action purports to be based upon alleged violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C.A. §77q(a)).

Second: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph "2" of the complaint, except alleges, upon information and belief, that an order was entered in the Supreme Court of the State of New York, County of New York, on the 24th day of May, 1963 in a proceeding entitled "In the Matter of the Application of Thomas Thacher as Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business of and dissolve the corporate charter of Manhattan Casualty Company", Index No. 40931/1963, to which order reference is made for the terms thereof, and admits that Thomas Thacher was, as of the date of the complaint, Superintendent of Insurance of the State of New York.

Third: Admits the allegations contained in Paragraph "3" of the complaint.

Answer, Bankers Life and Casualty Company

Fourth: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs "4", "5", "6", "7", "8", "9", "10", "11" and "12".

Fifth: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph "13" of the complaint, except admits that Manhattan Casualty Company was incorporated under the laws of the State of New York on January 13, 1949 and commenced business on or about June 1, 1949.

Sixth: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs "14" and "15" of the complaint.

Seventh: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph "16" of the complaint, except alleges, upon information and belief, that an order was entered in the Supreme Court of the State of New York, County of New York, on the 24th day of May, 1963 in a proceeding entitled "In the Matter of the Application of Thomas Thacher as Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business of and dissolve the corporate charter of Manhattan Casualty Company", Index No. 40931/1963, to which order reference is made for the terms thereof.

Eighth: Denies each and every allegation contained in Paragraph "17" of the complaint, except admits that in November, 1961 Bankers Life was the owner of all of the issued and outstanding capital stock of Manhattan Cas-

ualty Company, and that the said issued and outstanding capital stock consisted of 100,000 shares of Prior Preferred Stock, 30,000 shares of Preferred Stock, and 180,000 shares of Common Stock.

Ninth: In answer to Paragraph "18" of the complaint, denies each and every allegation contained therein insofar as any of said allegations are made, or purport to be made, in respect of Bankers Life and/or any of its officers, agents and representatives, and denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph "18" insofar as any of the allegations contained therein are made in respect of the other defendants and/or their officers, agents and representatives.

Tenth: Denies each and every allegation contained in Paragraph "19" of the complaint.

Eleventh: Denies each and every allegation contained in Pargagraph "20" of the complaint, except admits that a certain contract was made on January 19, 1962 to which reference is made for the terms thereof, that Bankers Life executed the said contract by James W. Bourland, Vice President, that Manhattan Casualty Company executed the said contract by James W. Bourland, Executive Vice President, and that the said contract was executed by James F. Begole.

Twelfth: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs "21", "22", "23", "24" and "25".

Thirteenth: Denies each and every allegation contained in Paragraph "26" of the complaint, except admits that in

the forenoon of January 24, 1962 a contract closing took place at the offices of Manhattan Casualty Company, that Bankers Life received a check of Irving Trust Company in the sum of $5,000,000 payable to the order of Bankers Life, and that in consideration therefor Bankers Life delivered the certificates for all of the issued and outstanding capital stock of Manhattan Casualty Company together with assignments thereof.

Fourteenth: Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs "27", "28", "29", "30", "31", "32", "33", "34", "35", "36", "37", "38" and "39".

Fifteenth: In answer to Paragraph "40" of the complaint, denies the allegation contained therein that the "foregoing transactions" referred to in said Paragraph "40" constituted violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C.A. §77q(a)), and denies any knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in said Paragraph "40".

For a First Affirmative Defense, Bankers Life Alleges:

Sixteenth: The complaint fails to state a claim upon which relief may be granted against Bankers Life.

For a Second Affirmative Defense Bankers Life Alleges:

Seventeenth: Contrary to the allegations of Paragraph "1" of the complaint, neither this action nor any claim

alleged against Bankers Life is properly based upon any violation of Section 17(a) of the Securities Act of 1933 (15 U.S.C.A. §77q(a)).

Eighteenth: Bankers Life has not been properly or sufficiently served with process in this action, the purported service of the summons and complaint in this action upon Bankers Life having occurred in the State of Illinois.

Nineteenth: By reason of the matter in this defense alleged, this Court lacks jurisdiction over the person of Bankers Life under Section 22(a) of the Securities Act of 1933 (15 U.S.C.A. §77v(a)).

Wherefore, defendant Bankers Life and Casualty Company asks judgment dismissing the complaint against it together with the costs and disbursements of this action.

Answer, Irving Trust Company

[SAME TITLE]

Defendant Irving Trust Company by its attorneys, Winthrop, Stimson, Putnam & Roberts, for its answer to the complaint herein alleges:

1. Answering the allegations of Paragraph 1 of the complaint, this defendant admits that the complaint in this action is based on alleged violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C.A. § 77q(a)). Except as herein expressly admitted, this defendant denies each and every allegation contained in Paragraph 1 of the complaint.

2. Answering the allegations of Paragraph 2 of the complaint, this defendant admits that on May 24, 1963 by Order of the Supreme Court of the State of New York Thomas Thacher, as Superintendent of Insurance, was appointed Liquidator of Manhattan Casualty Company. Except as herein expressly admitted, this defendant denies on information and belief each and every allegation contained in Paragraph 2 of the complaint.

3. This defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 3 of the complaint.

4. This defendant admits the allegations of Paragraph 4 of the complaint.

5. This defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs 5 to 15 inclusive of the complaint.

Answer, Irving Trust Company

6. This defendant admits the allegations of Paragraph 16 of the complaint.

7. This defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 17 of the complaint.

8. Answering the allegations of Paragraph 18 of the complaint, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in said paragraph relating to acts or actions of persons or corporations other than itself or its officers or its agents or its representatives. In all other respects this defendant denies each and every allegation contained in Paragraph 18 of the complaint.

9. This defendant denies knowledge or information sufficient to form a belief as to each and every allegatiion contained in Paragraphs 19 to 23 inclusive of the complaint.

10. Answering the allegations in Paragraph 24 of the complaint, this defendant admits that (a) on January 23, 1962 Mr. George Garvin, of Garvin, Bantel & Co., asked Mr. C. J. Gunter, Assistant Secretary of Irving Trust Company, if Mr. Gunter could have a check of Irving Trust Company for $5,000,000 available for delivery on January 24, 1962; and (b) on January 24, 1962 Mr. Garvin asked Mr. Gunter to bring to the office of Garvin, Bantel & Co. a check of Irving Trust Company for $5,000,000 payable to Bankers Life and Casualty Company and advised Mr. Gunther that the money to cover the check would be provided by the proceeds of sale of securities which would be delivered from Chemical Bank New York Trust Company. Except as herein expressly admitted this defendant denies

each and every allegation contained in Paragraph 24 of the complaint.

11. Answering the allegations of Paragraph 25 of the complaint, this defendant admits that on the morning of January 24, 1962 Mr. Gunter appeared at the office of Garvin, Bantel & Co. and that Messrs. Begole, Bourne, Sweeny and Garvin were present. This defendant denies that on that occasion Mr. Begole executed any notes payable to New England Note Corporation or to anyone else in the presence of Mr. Gunter. Except as herein expressly admitted or denied, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 25 of the complaint.

12. Answering the allegations of Paragraph 26 of the complaint, this defendant admits that (a) on the morning of January 24, 1962 Messrs. Gunter, Begole and Sweeny went to the office of Manhattan Casualty Company from the office of Garvin, Bantel & Co.; (b) at the office of Manhattan Casualty Company Mr. Gunter delivered to Mr. Sweeny an Irving Trust Company check for $5,000,000 payable to Bankers Life and Casualty Company; and (c) during the course of the meeting at Manhattan Casualty Company Mr. Sweeny gave Mr. Gunter an unsealed envelope which was returned to Mr. Sweeny the same day without Mr. Gunter having examined the contents thereof. Except as herein expressly admitted, this defendant denies each and every allegation contained in Paragraph 26 of the complaint.

13. Answering the allegations of Paragraph 27 of the complaint, this defendant admits that (a) on January 24, 1962, shortly after Mr. Gunter's return to Irving Trust

Company from the office of Manhattan Casualty Company, $5,155,000 face value United States Government securities, which it was informed were the property of Manhattan Casualty Company, were delivered to Irving Trust Company by Chemical Bank New York Trust Company; (b) the said securities were sold on that date for the account of Manhattan Casualty Company to Second District Securities Company and were delivered by Irving Trust Company into the account of Second District Securities Company at Irving Trust Company; (c) proceeds of the sale of the said Government securities in the amount of $4,854,552.67, and amounts arising from the deposit of checks, were credited to an account in the name of Manhattan Casualty Company at Irving Trust Company; and (d) on the afternoon of January 24, 1962 the Irving Trust Company check payable to the order of Bankers Life and Casualty Company in the amount of $5,000,000 was charged against the proceeds of the sale of the said Government securities, but this defendant alleges that this entry was mistakenly made and that subsequent entries on its books were made to reflect the facts as Irving Trust Company understood them. Except as herein expressly admitted, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 27 of the complaint.

14. Answering the allegations of Paragraph 28 of the complaint, this defendant admits that (a) on the afternoon of January 24, 1962 Mr. Gunter, at the request of Mr. George Garvin of Garvin, Bantel & Co., brought to the offices of Belgian American Banking Corporation and/or Belgian American Bank & Trust Company an Irving Trust Company check in the amount of $5,000,000 payable to the

order of Belgian American Bank & Trust Company; (b) Mr. Gunter delivered the said check to Mr. Sweeny; and (c) while at the Belgian American offices Mr. Gunter received from Mr. Sandrisser a Belgian American Banking Corporation check for $5,000,000 payable to the order of Irving Trust Company New York for A/C of: New England Acceptance Co., Inc. Except as herein expressly admitted, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 28 of the complaint.

15. Answering the allegations of Paragraph 29 of the complaint, this defendant denies that any actions of Irving Trust Company and/or its officers, agents and representatives were taken for the purpose alleged in Paragraph 29 of the complaint. Except as herein expressly denied, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 29 of the complaint.

16. Answering the allegations of Paragraph 30 of the complaint, this defendant admits that an account of Manhattan Casualty Company was opened at Irving Trust Company on January 24, 1962. Except as herein expressly admitted, this defendant denies each and every allegation contained in Paragraph 30 of the complaint.

17. This defendant denies each and every allegation contained in Paragraph 31 of the complaint.

18. Answering the allegations of Paragraph 32 of the complaint, this defendant admits that, because instructions regarding the transactions alleged in the complaint were received from Mr. Garvin of Garvin, Bantel & Co., Irving

Trust Company requested Mr. Garvin to obtain from New England Acceptance Co., Inc. and from any other necessary persons back dated authorizations for actions taken by Irving Trust Company, pursuant to instructions of Mr. Garvin. This defendant denies that any such request was made for the purpose of concealing any of the transactions alleged in the complaint. Except as herein expressly admitted or denied, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 32 of the complaint.

19. This defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs 33 to 35 inclusive, of the complaint.

20. Answering the allegations of Paragraph 36 of the complaint, this defendant admits that (a) a letter dated January 21, 1963 signed by Mr. Begole, as Chairman of Manhattan Casualty Company, requested Irving Trust Company to issue bearer Certificates of Deposit in the amount of $5,500,000 and directed delivery of said Certificates to Garvin, Bantel & Co.; and (b) on January 22, 1963 Irving Trust Company was advised that The Marine Midland Trust Company had transferred $5,500,000 in Federal funds to Irving's account at the Federal Reserve Bank, and in return for this transfer of Federal funds Irving Trust Company delivered, upon the instructions of Garvin, Bantel & Co., to The Marine Midland Trust Company, Irving Trust Company bearer Certificates of Deposit in the amount of $5,500,000. This defendant denies that any actions were taken by Irving Trust Company and/or its officers, agents and representatives for the purposes set forth in Paragraph 34 of the complaint or in furtherance of the alleged scheme to defraud. Except as herein ex-

pressly admitted or denied, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 36 of the complaint.

21. Answering the allegations of Parapraph 37 of the complaint, this defendant admits that on January 25, 1963 a representative of Irving Trust Company appeared at a meeting at the offices of Belgian American Banking Corporation and/or Belgian American Bank & Trust Company for the sole purpose of delivering Irving Trust Company's check to Belgian American Banking Corporation in the amount of $5,250,000 and receiving in return therefor a Belgian American Bank & Trust Company check payable to the order of Irving Trust Company in the amount of $5,500,000. This defendant denies that any actions were taken by Irving Trust Company and/or its officers, agents and representatives for the purposes described in Paragraph 34 of the complaint. Except as herein expressly admitted or denied, this defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 37 of the complaint.

22. This defendant denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph 38 of the complaint.

23. Answering the allegations of Paragraph 39 of the complaint, this defendant admits that on or about May 15, 1963 it delivered a communication to a person who identified himself as a representative of the New York State Insurance Department. For the contents of said communication this defendant asks leave to refer to the original thereof when the same is produced and proven at the trial

of this action. Except as herein expressly admitted, this defendant denies each and every allegation contained in Paragraph 39 of the complaint.

24. This defendant denies each and every allegation contained in Paragraph 40 of the complaint.

For an Affirmative Defense to the Claim Alleged in the Complaint

Defendant Irving Trust Company alleges on information and belief that:

25. By order of the Supreme Court of the State of New York held in and for the County of New York, entered on May 24, 1963, Manhattan Casualty Company was dissolved and plaintiff was appointed Liquidator thereof. Plaintiff commenced this action as such Liquidator.

26. As Liquidator, plaintiff sues as the representative of creditors and stockholders, and plaintiff has the duty to effectuate distribution of any recovery in this action to creditors and stockholders of Manhattan Casualty Company entitled to share therein.

27. Although the Superintendent of Insurance has submitted to the Supreme Court of the State of New York a report indicating that as of March 31, 1963 the excess of liabilities over admitted assets of Manhattan Casualty Company was $1,202,161.86, plaintiff is praying for damages herein in excess of $5,500,000. The recovery prayed for in this action is therefore primarily for the benefit of the dissolved Manhattan Casualty Company's stockholders.

28. If, as plaintiff himself alleges, the sole stockholder of Manhattan Casualty Company participated in the fraud

upon that corporation alleged in the complaint, any present holder of its stock either participated in the alleged fraud or became a stockholder subsequent thereto and cannot share in the distribution of any recovery for damages suffered as a result of such fraud. Plaintiff does not have the right to maintain this action as the representative of any such stockholder, nor to recover damages for distribution to any such stockholder.

WHEREFORE, this defendant demands judgment dismissing the complaint against it and granting such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this action.

Answer, Belgian-American Banking Corporation and Belgian-American Bank and Trust Company

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[SAME TITLE]

Defendants BELGIAN-AMERICAN BANKING CORPORATION and BELGIAN-AMERICAN BANK AND TRUST COMPANY, by Sullivan & Cromwell, their attorneys, answering the complaint herein:

1. Deny each and every allegation contained in paragraphs 1, 23 and 40.

2. Answering paragraph 2, deny that plaintiff is Superintendent of Insurance, admit that plaintiff was Superintendent of Insurance when this action was commenced, and admit the other allegations of said paragraph.

3. Admit the allegations contained in paragraphs 5, 6 and 38.

4. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 30, 31, 32, 36 and 39.

5. Answering paragraph 18, deny each and every allegation of said paragraph as to defendant Belgian-American Banking Corporation, defendant Belgian-American Bank and Trust Company and their officers, agents and representatives, and deny knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in said paragraph.

Answer, Belgian-American Banking Corporation and Belgian-American Bank and Trust Company

6. Answering paragraph 28, admit that in the afternoon of January 24, 1962, C. Joseph Gunter brought to the offices of Belgian-American Bank and Trust Company a check of Irving Trust Company in the amount of $5,000,000 payable to the order of Belgian-American Bank and Trust Company; admit that said check was handed to defendant Sweeny, who delivered it to Belgian-American Bank and Trust Company, against which Belgian-American Bank and Trust Company issued a certificate of deposit in the amount of $5,000,000 maturing in six months; admit that the certificate of deposit was endorsed on behalf of Manhattan Casualty Company by defendant Sweeny and Milton Katz to the order of New England Acceptance Company, Inc.; admit that the certificate of deposit was endorsed on behalf of New England Acceptance Company, Inc. by defendant Bourne to the order of Belgian-American Banking Corporation; admit that the said certificate of deposit was delivered to defendant Belgian-American Banking Corporation as collateral for a six-month loan of $5,000,000 made by Belgian-American Banking Corporation to New England Acceptance Company, Inc.; admit that Belgian-American Banking Corporation loaned $250,000 to New England Acceptance Company, Inc. secured by the pledge of 100,000 shares of prior preferred stock of Manhattan Casualty Company, 30,000 shares of preferred stock of Manhattan Casualty Company and 180,000 shares of common stock of Manhattan Casualty Company; admit that the amount of $250,000 was deposited by New England Acceptance Company, Inc. in an account at Belgian-American Bank and Trust Company, that upon instructions from New England Acceptance Company, Inc. $100,000 were transferred from this account to Belgian-American Banking Corporation as

prepaid interest on the loan to New England Acceptance Company, Inc. in the amount of $5,000,000, that a check drawn on this account to the order of defendant Garvin, Bantel & Co. in the amount of $25,000 was paid, and that a check drawn on this account to the order of defendant James F. Begole in the amount of $50,000 was paid; and, except as so admitted, deny knowledge or information sufficient to form a belief as to the truth of each and every allegation of said paragraph.

7. Answering paragraph 29, deny each and every allegation of said paragraph as to defendants Belgian-American Banking Corporation and Belgian-American Bank and Trust Company and deny knowledge or information sufficient to form a belief as to the truth of each and every other allegation of said paragraph.

8. Answering paragraph 33, admit that on July 24, 1962, the certificate of deposit in the amount of $5,000,000 dated January 24, 1962 and the loan in the amount of $5,000,000 by Belgian-American Banking Corporation to New England Acceptance Company, Inc. matured, and, except as so admitted, deny each and every allegation contained in said paragraph.

9. Answering paragraph 34, admit that defendant Sweeny, as President of Manhattan Casualty Company, wrote letters dated August 30, 1962, to Belgian-American Bank and Trust Company, to which defendants refer for their language, and, except as so admitted, deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in said paragraph.

Answer, Belgian-American Banking Corporation and Belgian-American Bank and Trust Company

10. Answering paragraph 35, admit that loans made by Belgian-American Banking Corporation to New England Note Corporation in the total amount of $5,250,000 plus interest were payable on January 24, 1963, admit that Belgian-American Banking Corporation refused to renew said loans, and, except as so admitted, deny each and every allegation of said paragraph.

11. Answering paragraph 37, admit that Irving Trust Company issued its check to Belgian-American Banking Corporation in the amount of $5,250,000 and that said check was accepted by Belgian-American Banking Corporation as payment of loans to New England Note Corporation; admit that on January 25, 1963, Belgian-American Bank and Trust Company credited the account of Manhattan Casualty Company in the amount of $5,075,616.44, and in the amount of $515,361.08, the latter amount having been received against delivery of a certificate of deposit issued by the First National Bank of Boston and payable to Manhattan Casualty Company and admit that at the direction of Manhattan Casualty Company, Belgian-American Bank and Trust Company issued its check drawn to the order of Irving Trust Company in the amount of $5,500,000, which was debited to the account of Manhattan Casualty Company; and, except as so admitted, deny each and every allegation contained in said paragraph.

WHEREFORE, defendants Belgian-American Banking Corporation and Belgian-American Bank and Trust Company demand that the complaint herein be dismissed with costs.

Dated: October 8, 1963.

Amended Answer, Garvin, Bantel & Co.

[SAME TITLE]

Defendant, GARVIN, BANTEL & CO., by DUGAN & ROSEN, their attorneys, answering the complaint herein by amended answer.

1. Denies each and every allegation contained in paragraphs "1, 22, 23, and 40" of the complaint.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 24, 25, 26, 30, 31, 32, 33, 34, 35, 37, 38, and 39.

3. Answering the allegations of Par. 2 of the Complaint, upon information and belief, denies that plaintiff is the Superintendent of Insurance, and admits all other allegations.

4. Admits the allegations contained in paragraph 7.

5. Answering the allegations of par. 9, denies any knowledge or information sufficient to form a belief, except admits that at all times mentioned, GEORGE K. GARVIN was a partner in GARVIN, BANTEL & CO.

6. Answering Par. 18, denies each and every allegation as to defendant, Garvin, Bantel & Co. and denies any knowledge or information sufficient to form a belief as to the allegations pertaining to all other defendants.

7. Denies each and every allegation contained in Par. 27 except admits that on or about January 24, 1962, MAN-

HATTAN CASUALTY COMPANY requested the sale of United States Government securities in the face amount of $5,155,000, at Market, and to transfer the proceeds to the account of Manhattan Casualty Company at IRVING TRUST COMPANY. That pursuant to such request, the United States Government securities were sold to Second District Securities Company for the account of Manhattan Casualty Company for the sum of $4,854,552.67 and the proceeds thereof were duly transferred to Irving Trust Company for the account of Manhattan Casualty Company.

8. Denies each and every allegation of Par. 28 and 29 as it pertains to defendant, Garvin, Bantel & Co, and denies any knowledge or information sufficient to form a belief insofar as it pertains to all other defendants, except admits receiving a fee of $25,000 from NEW ENGLAND NOTE CORPORATION for arranging its loan with BELGIAN AMERICAN BANK & TRUST CO.

9. Upon information and belief denies each and every allegation contained in Paragraph 36, except admits that defendant Garvin, Bantel & Co. borrowed $5,500,000 from MARINE MIDLAND which was secured by bearer Certificates of Deposit in a like amount, issued by Irving Trust Company.

As and For an Affirmative Defense

Upon information and belief, the defendant, Garvin, Bantel & Co. alleges:

10. By order of the Supreme Court of the State of New York held in and for the County of New York, entered on May 24, 1963, Manhattan Casualty Company was dis-

solved and planitiff was appointed Liquidator thereof. Plaintiff commenced this action as such Liquidator.

11. As Liquidator, plaintiff sues as the representative of creditors and stockholders, and plaintiff has the duty to effectuate distribution of any recovery in this action to creditors and stockholders of Manhattan Casualty Company entitled to share therein.

12. Although the Superintendent of Insurance has submitted to the Supreme Court of the State of New York a report indicating that as of March 31, 1963 the excess of liabilities over admitted assets of Manhattan Casualty Company was $1,202,161.86, plaintiff is praying for damages herein in excess of $5,500,000.00. The recovery prayed for in this action is therefore primarily for the benefit of the dissolved Manhattan Casualty Company's stockholders.

13. That the plaintiff herein does therefore bring this action on behalf of the Stockholders of Manhattan Casualty Company.

14. That plaintiff alleges in his verified complaint, that the stockholder participated in the alleged fraud.

15. That any subsequent stockholder took the Stock with full knowledge of such alleged fraud and that the plaintiff herein, bringing this action on behalf of said Stockholders is therefore himself impinged with the same alleged fraud.

16. That the plaintiff therefore does not have the right to maintain this action.

WHEREFORE, this defendant demands judgment dismissing the complaint against it and granting such other and further relief as to this Court may seem just and proper, together with costs and disbursements of this action.

Answer, George K. Garvin

[SAME TITLE]

Defendant, GEORGE K. GARVIN, by his attorneys, Javits & Javits, answering the complaint herein, respectfully alleges:

1. Denies each and every allegation contained in paragraphs "1", "22", "23", "24", "25", "26", "32" and "40" of the complaint.

2. Admits the allegations contained in paragraph "2" of the complaint, except denies that plaintiff is the Superintendent of Insurance of the State of New York.

3. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "3", "4", "5", "6", "8", "10", "11", "12", "13", "14", "15", "17", "19", "20", "21", "30", "31", "33", "34", "35", "37", "38" and "39" of the complaint.

4. Admits the allegations contained in paragraph "7" of the complaint.

5. Admits the allegations contained in paragraph "9" of the complaint, except denies that defendant, George K. Garvin, is a partner in Garvin, Bantel & Company since as of November 1, 1963.

6. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "16" of the complaint, except admits that an order was entered in the Supreme Court of the State of New York,

County of New York, on the 24th day of May, 1963 in a proceeding entitled "In the Matter of the Application of THOMAS THACHER as Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business of and dissolve the corporate charter of Manhattan Casualty Company", Index No. 40931/1963, to which order reference is made for the terms thereof.

7. Denies each and every allegation contained in paragraph "18" of the complaint with respect to defendant, George K. Garvin, and denies knowledge or information sufficient to form a belief as to the allegations contained therein with respect to the other defendants.

8. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "27" of the complaint, except admits that on or about January 24, 1962, Manhattan Casualty Company requested the sale of United States Government securities in the face amount of $5,155,000, at Market, and to transfer the proceeds to the account of Manhattan Casualty Company at Irving Trust Company. That pursuant to such request, the United States Government securities were sold to Second District Securities Company for the account of Manhattan Casualty Company for the sum of $4,854,552.67 and the proceeds thereof were duly transferred to Irving Trust Company for the account of Manhattan Casualty Company.

9. Denies each and every allegation contained in paragraph "28" of the complaint with respect to defendant, George K. Garvin, and denies knowledge or information sufficient to form a belief as to the allegations contained

therein with respect to the other defendants, except admits that defendant, Garvin, Bantel & Company, received a fee from New England Note Corporation in the amount of $25,000.

10. Denies each and every allegation contained in paragraph "29" of the complaint with respect to defendant, George K. Garvin, and denies knowledge or information sufficient to form a belief as to the allegations contained therein with respect to the other defendants.

11. Denies each and every allegation contained in paragraph "36" of the complaint, except admits that defendant, Garvin, Bantel & Company, borrowed the sum of $5,500,000 from Marine Midland which amount was secured by bearer certificates of deposit issued by defendant, Irving Trust Company, in the amount of $5,500,000.

AS AND FOR AN AFFIRMATIVE DEFENSE:

Upon information and belief, the defendant, GEORGE K. GARVIN, alleges:

12. By order of the Supreme Court of the State of New York held in and for the County of New York, entered on May 24, 1963, Manhattan Casualty Company was dissolved and plainitff was appointed Liquidator thereof. Plaintiff commenced this action as such Liquidator.

13. As Liquidator, plaintiff sues as the representative of creditors and stockholders, and plaintiff has the duty to effectuate distribution of any recovery in this action to creditors and stockholders of Manhattan Casualty Company entitled to share therein.

Answer, George K. Garvin

14. Although the Superintendent of Insurance has submitted to the Supreme Court of the State of New York a report indicating that as of March 31, 1963 the excess of liabilities over admitted assets of Manhattan Casualty Company was $1,202,161.86, plaintiff is praying for damages herein in excess of $5,500,000. The recovery prayed for in this action is therefore primarily for the benefit of the dissolved Manhattan Casualty Company's stockholders.

15. If, as plaintiff alleges, the sole stockholder of Manhattan Casualty Company participated in the fraud upon that corporation alleged in the complaint, any present holder of its stock either participated in the alleged fraud or became a stockholder subsequent thereto and cannot share in the distribution of any recovery for damages suffered as a result of such fraud. Plaintiff does not have the right to maintain this action as the representative of any such stockholder, nor to recover damages for distribution to any such stockholder.

WHEREFORE, defendant GEORGE K. GARVIN demands judgment dismissing the complaint against him and granting such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this action.

Opinion, Ryan, J. Dated June 19, 1968, Denying Motion For Summary Judgment

[SAME TITLE]

Defendant, BANKERS LIFE AND CASUALTY COMPANY, moves on the pleadings and on the record of proceedings in this case for summary judgment. Rule 56(b) and (c). It urges that, upon the extensive record of more than 12,000 pages of deposition testimony and 500 exhibits amassed in the four years that this suit has been pending, no issues as to the liability of movant have emerged. In support of its motion, it has submitted affidavits of its counsel as the person having actual knowledge of the record in the case.

At the same time, counsel for BANKERS LIFE obliquely challenges the jurisdictional basis for the suit, saying "in view of the lack of any factual basis for including Bankers Life as a defendant in this action, it is respectfully submitted there is no need to detain the Court with consideration of the inapplicability of Section 17(a) of the Securities Act of 1933 as a jurisdictional basis for the present action. It is noteworthy, however, that in 1965 plaintiff's attorney, in evident recognition of the fact that the instant action was improperly brought, commenced another action in the Supreme Court of the State of New York in and for the County of New York seeking identical relief against the same defendants."

Counsel for plaintiff, ignoring this statement, has submitted an affidavit to the effect that a question of fact as to BANKERS LIFE'S knowledge of the fraud charged to have been perpetrated in the sale of MANHATTAN'S assets has been raised by the circumstances surrounding the sale and

Opinion, Ryan, J. Dated June 19, 1968, Denying Motion For Summary Judgment

that, in any event, there is an issue of credibility of witnesses precluding the granting of judgment.

Because of the question raised by counsel for BANKERS LIFE and because of the Court's own doubts as to the jurisdiction of this Court over the matters alleged in the complaint, we do not decide whether plaintiff has carried the burden of sustaining its claim against movant by pointing to a specific genuine issue of fact. We deny the motion for summary judgment not on the merits and without prejudice for the reason that this Court is powerless to pass upon it while its jurisdiction is thus challenged.

The complaint filed in August, 1963, says that "it is based on violations of Section 17A of the Securities Exchange Act of 1933 (15 U.S.C.A. 77q(a))". The plaintiff is the Superintendent of Insurance of the State of New York as Liquidator of MANHATTAN CASUALTY COMPANY, an insurance company incorporated under New York law. Although defendant BANKERS LIFE is a foreign corporation whose principal place of business is not disclosed, most of the defendants are New York residents, jurisdiction would, therefore, lie only on the basis of the statute pleaded, and not on diversity.

The complaint alleges that BANKERS LIFE in 1961 was the owner of all the outstanding shares of MANHATTAN; that commencing in or about November 1962, in connection with and in furtherance of the sale of said shares, the defendants employed a device, scheme and artifice to defraud MANHATTAN by instrumentalities in interstate commerce; that defendants BOURNE and BROOKS negotiated with Sweeny, who is not identified, and Bourland, the vice president of BANKERS LIFE, and others for the purchase of these shares; that a contract of sale was entered into between

Opinion, Ryan, J. Dated June 19, 1968,
Denying Motion For Summary Judgment

Bucola as purchaser and Bankers Life as seller of the shares of Manhattan, in exchange for a bank or certified check in the sum of five million dollars; that the contract was executed by Bourland for Bankers Life, and for Manhattan by Bourland as Executive Vice President, and by Bucola. There follows a series of allegations concerning the raising by Bucola of the agreed-on purchase price by a sale of Manhattan's securities, in which several of the defendants other than Bankers Life are named. It is then alleged in the complaint that at the office of Manhattan a check payable to Bankers Life was turned over to its Executive Vice President in return for which an unsealed envelope was handed over to Irving Trust, the maker of the check. The complaint then continues to allege that the check paid to Bankers Life was charged against securities, the property of Manhattan, which had been credited to the account of Manhattan at Irving Trust, and that the defendants other than Bankers Life engaged in a series of transactions in order to conceal the fact that the assets of Manhattan had been reduced by the value of the securities referred to; that Bankers Life had been paid out of the assets of Manhattan for the sale by it of its outstanding stock of Manhattan; and that Bucola had become the ostensible owner of said stock without any cash investment. Nowhere is it charged that the negotiations for the raising of the purchase price were participated in by Bankers Life or even that it had any knowledge of them. Finally, it is alleged that for the purpose of concealing the above facts defendant Irving Trust certified to plaintiff that Manhattan had on deposit $5,500,000 of unencumbered assets and that all this constituted violations of Section 17A, for which a money judgment in the amount of the securities—$5,500,000—is sought.

Opinion, Ryan, J. Dated June 19, 1968, Denying Motion For Summary Judgment

As Judge Friendly wrote in *Bartle, Trustee*, etc. v. *Markson*, 357 Fed. 2d 517: ". . . the question of federal jurisdiction should be faced in limine before reaching the issue of the trustee's capacity to sue, see Arrowsmith v. United Press International, 320 F.2d 219, 221 (2 Cir. 1963). . . . a federal court which has noted a possible lack of federal jurisdiction must generally decline to produce further until it has favorably resolved the doubt, Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed. 338 (1934), . . .".

It is difficult to determine from a reading of this complaint precisely what is charged against defendant BANKERS LIFE other than the conclusory allegation as to its participation in a scheme to defraud MANHATTAN, presumably to the detriment of creditors, although that, too, is not pleaded . . . See *Bartle* v. *Markson*, *supra*.

Section 17A, which is the only law with which this court is concerned, prohibits "in the offer or sale of any securities" in interstate commerce (1) to employ a device, scheme or artifice to defraud; or (2) to obtain money or property by means of an untrue statement of a material fact or an omission of a material fact; or (3) to engage in any transaction which would operate as a fraud upon the purchaser.

On this statutory language the Courts have engrafted certain requisites which must be met before a claim under this Section will be sustained. Travelling on the language is not sufficient to charge fraud. Neither does the statute represent a cure for all corporate frauds. *Barnett* v. *Anaconda*, 238 F. Supp. 766, 770.

Counsel for the respective parties should be given an opportunity to affirmatively show wherein the complaint does or does not sufficiently plead facts to support a violation of the statute as well as plaintiff's standing to sue as a person aggrieved under the statute. See *Mooney* v. *Vitolo*, Civ. 67-

Opinion, Ryan, J. Dated June 19, 1968, Denying Motion For Summary Judgment

1500 S.D.N.Y., Dec. 6, 1967. On the facts alleged, jurisdiction does not emerge with the clarity it should for federal purposes.

Motion for summary judgment is denied without prejudice, until the question of the jurisdiction of this Court to act over it is determined by appropriate direct hearing on the defendant's challenge to the jurisdiction of this Court.

So ordered.

Dated: June 19, 1968.

/s/ Sylvester J. Ryan
U.S.D.J.

Notice of Motion to Dismiss Complaint, Bankers Life and Casualty Company

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that, upon the Order of Hon. Sylvester J. Ryan, U.S.D.J., duly made, entered and filed in the office of the Clerk of this Court on the 19th day of June, 1968, upon all of the pleadings and upon the plaintiff's attorney's statement to the Court on November 6, 1963 set forth in the memorandum of law submitted herewith, the undersigned will move this Court at the United States Courthouse, Foley Square, New York, New York on the 23rd day of July, 1968, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard,

(a) for an order, pursuant to an Order of this Court, dated June 19, 1968, per Ryan, J., and pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure, granting judgment on the pleadings dismissing the complaint as to defendant Bankers Life and Casualty Company, together with costs and disbursements of this action, on the ground that said defendant is entitled to judgment as a matter of law by reason of the following:

(i) the action is purportedly based on Section 17(a) of the Securities Act of 1933, 15 U.S.C.A., §77q(a), whereas the complaint fails to state facts constituting any violation of said Section 17(a);

(ii) plaintiff is not a person aggrieved under Section 17(a) since plaintiff is not a defrauded purchaser

of securities and Section 17(a), at most, provides a remedy in favor only of defrauded purchasers of securities; and

(iii) the Court lacks jurisdiction over the subject matter of this action; and

(b) for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
July 12, 1968

Yours, etc.,

JACOBS PERSINGER & PARKER

Notice of Motion to Dismiss Complaint, Irving Trust Company

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the pleadings in this action, upon the order of Hon. Sylvester J. Ryan, U.S.D.J., entered June 19, 1968, and upon all the proceedings heretofore had herein, the undersigned will move this Court, at a Motion Term to be held in Room 506, United States Court House, Foley Square, New York, New York, on the 24th day of September, 1968, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure dismissing the complaint herein as against defendant Irving Trust Company, directing the entry of final judgment, and granting such other and further relief as the Court may deem just and proper. The grounds of this motion are that (1) the Court does not have jurisdiction over the subject matter of this action and (2) the complaint fails to state any claim upon which relief can be granted.

Dated: New York, New York
September 9, 1968

Yours, etc.,

WINTHROP, STIMSON, PUTNAM & ROBERTS

Notice of Motion to Dismiss Complaint, Belgian-American Banking Corporation and Belgian-American Bank and Trust Company

[BANK TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the pleadings in this action and the opinion of Honorable Sylvester J. Ryan, District Judge, filed June 19, 1968, the undersigned will move this Court, at the Motion Part thereof, Room 506, United States Courthouse, Foley Square, New York, N.Y., on the 23rd day of July, 1968, at 10:00 A.M. or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12(c) and 12(h)(3), Federal Rules of Civil Procedure, granting judgment on the pleadings dismissing the complaint on the grounds that plaintiff fails to state a claim upon which relief can be granted and that this Court lacks jurisdiction over the subject matter of this action.

Dated: New York, N.Y.
July 3, 1968

Yours, etc.,

SULLIVAN & CROMWELL

Notice of Motion to Dismiss Complaint, Garvin Bantel and Company and George K. Garvin

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the pleadings and the opinion of Honorable Sylvester J. Ryan, District Judge, filed on June 19, 1968, the undersigned will jointly move this Court at the Motion Part thereof, Room 506, United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 24th day of September, 1968 at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order pursuant to Rules 12(c) and 12(h)(3) of the Federal Rules of Civil Procedure, granting judgment on the pleadings dismissing the complaint on the ground that plaintiff fails to state a claim upon which relief can be granted and that this Court lacks jurisdiction over the subject matter of this action.

Dated: New York, N. Y.
September 5, 1968

Yours, etc.

BASCH AND SEITS
POLETTI, FREIDIN, PRASHKER,
FELDMAN & GARTNER

Opinion, Herlands, J. Dismissing the Complaint

[SAME TITLE]

HERLANDS, *District Judge:*

The issue for decision is another illustration of the recurring problem whether plaintiff's claim belongs in the state courts or whether plaintiff has stated a cause of action under the federal securities laws—the Securities Act of 1933 (1933 Act), 15 U.S.C. §§77 *et seq.* (1964) and the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. §§78 *et seq.* (1964), and the pertinent rules and regulations of the Securities and Exchange Commission. This question is posed by motions made by three of the defendants to dismiss the complaint.

The movants are defendants Bankers Life and Casualty Company ("Bankers Life"), Belgian American Banking Corporation ("Belgian American Banking"), and Belgian American Bank and Trust Company ("Belgian American Trust").

The grounds of the motions are (1) that there is lack of jurisdiction over the subject matter; (2) that the complaint fails to state a claim upon which relief can be granted; and (3) that plaintiff lacks the requisite standing to recover damages for alleged violations of the 1933 and 1934 Acts.

Defendants maintain that plaintiff may not recover because (i) it[1] is neither a defrauded purchaser nor a de-

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[1] The Superintendent of Insurance of the State of New York is the nominal plaintiff. Since he, as Liquidator, has been vested with all rights of the Manhattan Casualty Company (hereinafter "Manhattan"), the rights he seeks to assert are precisely those possessed by Manhattan at the time of his appointment as Liquidator. Consequently, the questions of standing to initiate suit and of injury will be determined as if Manhattan itself had brought suit.

frauded seller of securities within the meaning of the 1933 and 1934 Acts, and (ii) these federal statutes have never been and should not be interpreted so as to make them applicable to remedy the injury allegedly resulting from the facts asserted in the complaint. A comprehensive restatement of the facts alleged in the complaint is requisite for a comprehension of the following discussion of the critical legal issues.[2]

EVENTS PRIOR TO JANUARY 24, 1962

Manhattan Casualty Company ("Manhattan") was a New York corporation engaged in the insurance business. At the beginning of the period under consideration, Bankers Life was the owner of all of the outstanding shares of Manhattan stock. The management of Manhattan apparently was distinct from that of Bankers Life.

During the fall of 1961, Bankers Life decided to discontinue its ownership of Manhattan. Sometime in November,

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[2] These motions were made pursuant to an order entered by District Judge Sylvester J. Ryan on June 19, 1968 denying, without prejudice, a motion for summary judgment under Fed. R. Civ. P. 56(b), (c) because subject matter jurisdiction was doubtful. In light of that motion and its disposition, this Court will not treat the instant motions as motions for summary judgment by looking outside the face of the pleadings. The Court will rule on the questions of jurisdiction and the sufficiency of the complaint solely on the basis of its allegations.

The complaint, however, does not contain "a short and plain statement" (Fed. R. Civ. P. 8(a)) of the claim; its averments are not "simple, concise and direct" (Fed. R. Civ. P. 8(e)); and the intricacies of the pleaded transactions cannot immediately be interrelated.

As a consequence, the Court has been compelled to undertake the task of describing the sequence of events as coherently as the complaint permits. The Court has noted, when necessary, the gaps in the narrative which were filled through other sources (these facts not playing a part in the disposition of the motions) and those gaps which remain void.

1961,[3] Bankers Life, through James W. Bourland, a vice-president of Bankers Life, commenced negotiations for the sale of all the Manhattan stock. The prospective purchasers were two individuals, defendants Standish T. Bourne and James F. Begole. (¶19).

At about the time that Bankers Life decided to sell its Manhattan stock, it ousted the defendant John F. Sweeny from the presidency of Manhattan.[4] Sweeny, however, established contact between Begole and Bourne and Bankers Life. Probably at that time, Sweeny also arranged with Begole and Bourne that he should be reinstated as president of Manhattan when, and if, Begole and Bourne acquired control of Manhattan.

The negotiations drew to a successful conclusion. On January 19, 1962, a contract for the purchase and sale of all the Manhattan shares was entered into by Bankers Life (still through Bourland, as its vice-president) and Begole, individually. Begole, alone and in his own name, was to purchase the Manhattan shares. He agreed to deliver to Bankers Life at the closing on January 24, 1962 a bank check or certified check in the amount of $5,000,000. (¶20).

The complaint does not charge that any misrepresentations, deceit or non-disclosures had been made or practiced upon any party in connection with this contract of purhase and sale. The complaint is devoid of allegations respecting

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[3] Paragraph 18 of the complaint alleges that the acts in furtherance of and connection with the scheme to defraud were commenced in November, 1962. However, it is obvious from the succeeding paragraphs that this date is a typographical error, and that the correct date is November, 1961.

[4] This information was conveyed to the Court at oral argument (Transcript, September 10, 1968 at 23-25). Sweeny's former relationship with Manhattan, his discharge by Bankers Life, and his subsequent connection with Bourne and Begole, are important for an understanding of the alleged fraud.

the net worth of Manhattan or its general financial position; thus, there is nothing upon which to base any finding as to the equity or unfairness of the contract.

Financing

Sometime after January 19, 1962 but before the closing date (January 24, 1962), Bourne had stated to Begole that he, Bourne, would arrange for the financing of the stock acquisition. (¶21). Bourne made contact with defendant George K. Garvin (a partner in the note brokerage firm Garvin, Bantel & Company, also a party defendant) and asked Garvin to have a bank issue certificates of deposit in the face amount of $5,000,000 and then to have a bank make a loan, using the certificates as collateral. (¶22). Other than the conclusory statement that the purpose of these two transactions was to conceal the scheme to defraud, there is nothing in the complaint's factual allegations that would explain the significance of these two transactions which, taken together, appear to be self-cancelling.

Acting upon Bourne's request, Garvin, prior to January 24, 1962, arranged with Belgian American Trust to issue a certificate of deposit in the face amount of $5,000,000, in the name of Manhattan. (¶23). The complaint is silent, however, as to whether Belgian American Trust was informed of the method of payment for this certificate of deposit. Presumably, it was so informed. Garvin also arranged with Belgian American Banking to loan to defendant New England Note Corporation—a company controlled by Bourne—$5,000,000 upon the collateral of the certificate of deposit that would be issued in the name of Manhattan. (¶23).

Also in preparation for the closing of January 24, 1962, Garvin met with C. Joseph Gunther, an officer of defendant

Irving Trust Company. Gunther agreed to bring to Garvin's office on January 24, 1962 a check in the amount of $5,000,000 payable to Bankers Life. This check was to be paid for by the delivery of various securities from Chemical Bank New York Trust Company to Irving Trust Company. (¶24).

TRANSACTIONS OF JANUARY 24, 1962

The Closing, the Payment for the Manhattan Shares, and the Sale of Manhattan's Portfolio

On the morning of January 24, 1962, Bourne, Sweeny, Begole, and Gunther appeared at Garvin's office. Begole then executed two notes,[5] both payable to New England Note Corporation. One was in the amount of $5,000,000, interest payable at 7½ per cent; the other in the amount of $250,000, interest payable at 5 per cent. The complaint is silent as to whether these notes were delivered. Begole also executed in favor of New England Note Corporation an assignment of the Manhattan stock that he would receive. (¶25). The economic purpose underlying these transactions is neither explained nor readily discernible.

Sweeny, Begole, Garvin, and Gunther then went to Manhattan's office for the closing of the sale of Manhattan stock. Gunther handed the $5,000,000 Irving Trust Company check to Leo Lehane, an executive vice-president of Bankers Life, and received in return an unsealed envelope. (¶26). The complaint contains no other allegations pertaining to the actual closing. It would be sheer speculation to assume that

[5] There are no allegations respecting the obligor, *i.e.*, whether these were personal notes of Begole or were to become obligations of Manhattan. It seems more likely that they were personal obligations of Begole because of the assignment of the shares by Begole to New England Note Corporation, which may have been intended as an assignment for security purposes.

the envelope did or did not contain the shares of Manhattan stock.

Nevertheless, Begole and Bourne presumably did obtain possession of the shares of Manhattan stock at some point because (as will be detailed later) these shares apparently were physically tendered as security for a loan.

Once the ownership of the shares of Manhattan stock apparently changed hands on January 24, 1962, the following took place: United States Government securities owned by Manhattan, in the face amount of $5,155,000, were delivered through Garvin, Bantel & Company to Irving Trust Company.

During the same day of January 24, 1962, Garvin, Bantel & Company sold these securities for Manhattan's account. Irving Trust Company delivered these securities to the purchaser and received the proceeds of $4,854,552.67, which amount it then credited to an account in Manhattan's name.

Manhattan (by some person not named) then transferred some cash to Irving Trust Company, which amount was also credited to this Manhattan account.

Finally, the $5,000,000 check of Irving Trust Company that Gunther had handed to Leo Lehane of Bankers Life was charged against this same Manhattan account in Irving Trust Company (¶27)—which had been built up by the crediting of the proceeds of the sale of Manhattan's portfolio of United States Government securities plus the additional Manhattan cash.

The net effect of the foregoing series of financial manoeuvres appears to be, up to this point, as follows:

(i) Bankers Life received $5,000,000 in cash for which it had ostensibly delivered all of its Manhattan stock;

(ii) Presumably, Begole (or possibly Bourne—through New England Note Corporation—as a result of Begole's

prior assignment of the Manhattan stock Begole would receive) owned all of the stock of Manhattan;

(iii) Manhattan's portfolio of United States Government securities had been sold off;

(iv) Manhattan transferred some cash to Irving Trust, thereby further building up its account;

(v) Irving Trust applied the total credit—created out of the Manhattan portfolio proceeds and the Manhattan cash—to the payment of the $5,000,000 Irving Trust check which Gunther had given Lehane of Bankers Life;

(vi) As a result, Manhattan's net assets were diminished by approximately $5,000,000; and

(vii) Payment of $5,000,000 to Bankers Life for the purchase of its Manhattan stock was effected by using Manhattan's own assets to pay for all of its stock, which Begole or Bourne thereby obtained without using a dollar of their own money.

Though the complaint is devoid of factual allegations on the point, apparently Sweeny assumed the office of president of Manhattan immediately after the acquisition of the Manhattan shares.[6] Conceivably it was he who directed the Chemical Bank to deliver Manhattan's portfolio of United States Government securities to Irving Trust, authorized the sale of these securities, and then transferred

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[6] In light of allegations that Bourne was required by Irving Trust, through Garvin, to execute certain backdated letters (¶32) and that Irving Trust made various entries after January 24, 1962 for the purpose of concealing the transactions of January 24, 1962 (¶31), the absence of any similar allegations respecting Sweeny's grant of authority might indicate that Begole, in fact, did immediately name a board of directors, which met and appointed Sweeny as president, granting him sufficient authority to effect the various transactions on Manhattan's behalf.

Manhattan cash to Irving Trust in order to cover completely the $5,000,000 Irving Trust check payable to Bankers Life.

The complaint is explicit, however, in charging that Sweeny, in his capacity as president of Manhattan, effected other transactions on January 24, 1962.

The Certificates of Deposit

Later that day, Gunther, at the request of Garvin, Bantel & Company, brought another Irving Trust check in the amount of $5,000,000, payable to Belgian American Trust, to the offices of Belgian American Trust. Gunther gave the check to Sweeny who delivered it to someone at Belgian American Trust. Belgian American Trust then issued a six-months certificate of deposit in the amount of $5,000,000 in the name of Manhattan, pursuant to Garvin's prior discussions with Belgian American Trust. Sweeny received the certificate of deposit and, in his capacity as president of Manhattan, immediately endorsed it to New England Note Corporation. (¶28).

Bourne, as president of New England Note Corporation, accepted the certificate of deposit from Sweeny; and, in turn, Bourne endorsed the certificate to Belgian American Banking.[7]

Belgian American Banking then made a six-months loan of $5,000,000 to New England Note Corporation and took possession of the certificate of deposit as collateral.

Belgian American Banking drew a $5,000,000 check, apparently payable to Irving Trust Company and delivered it to Gunther. (¶28).

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[7] The exact relationship between Belgian American Banking and Belgian American Trust was never explained in the complaint, nor at oral argument nor in counsel's briefs. It does not appear that, for purposes of these motions, this information is crucial.

To recapitulate for a moment at this point:

(1) Irving Trust Company in effect exchanged its $5,000,000 check payable to Belgian American Trust for a $5,000,000 check drawn by Belgian American Banking, payable to Irving Trust Company.

(2) Belgian American Trust issued a $5,000,000 certificate of deposit which in reality was paid for by the $5,000,000 emanating from Belgian American Banking in the form of the loan in the same amount made by Belgian American Banking to New England Note Corporation and collateralized by the very same $5,000,000 certificate of deposit of Belgian American Trust.

(3) The certificate of deposit issued by Belgian American Trust was issued in the name of Manhattan, though Manhattan did not pay for it and was in fact only an intermediate conduit for this certificate of deposit as it made its way from Belgian American Trust to Belgian American Banking.

At the same time that Belgian American Banking made the $5,000,000 loan to New England Note Corporation, it made another loan of $250,000 to New England Note Corporation and received as security the Manhattan shares assigned by Begole to New England Note Corporation. (¶28). Once again the complaint is not precise and does not allege specifically whether the Manhattan shares were actually delivered to Belgian American Banking.

The proceeds of this $250,000 loan were deposited in Belgian American Trust and the following amounts totalling $225,000 were disbursed: Garvin, Bantel—$25,000; Begole—$50,000; Bourne—$50,000; Belgian American Banking—$100,000. (¶28). It would be supposititious to attempt any explanation for the payment of the above $225,000. The

complaint does not allege that this transaction constituted fraud, but only that the various transactions with the Belgian American banks were effected for the purpose of concealing the fact that Manhattan's assets had been reduced by the sale of its securities—a fact which does, indeed, emerge clearly from the above labyrinthine transactions.

EVENTS SUBSEQUENT TO JANUARY 24, 1962

The complaint alleges other events which occurred subsequent to January 24, 1962, such as the making of entries by Irving Trust Company for the purpose of concealing the transactions of January 24, 1962 (¶31); and, for similar purposes, the execution by Bourne of various backdated letters which were given to Garvin on January 29, 1962 (¶32).

On July 24, 1962, the six-months certificate of deposit matured; the loan by Belgian American Banking to New England Note Corporation and the loans by New England Note Corporation to Begole fell due. Belgian American Trust then issued a new six-months certificate of deposit in Manhattan's name in the amount of $5,000,000. This certificate was endorsed by Begole (as chairman of Manhattan) and Sweeny (as treasurer) and posted as collateral for the Belgian American Banking-New England Note Corporation loans which were then extended to January 24, 1963. (¶33). The Manhattan stock at this point appears to be physically in the possession of Belgian American Banking as collateral for the loans. Finally, Begole's loans ($5,000,000 and $250,000) from New England Note Corporation were also extended to January 24, 1963. (¶33). It is alleged that these transactions were entered into for the purpose of furthering the scheme to defraud. (¶33).

While it would appear from the foregoing that Belgian American Banking was in possession of the $5,000,000 certificate of deposit, on August 30, 1962 Sweeny (in his capacity as president of Manhattan) wrote Belgian American Trust that he was forwarding to Belgian American Trust a non-negotiable certificate of deposit in the amount of $5,000,000 which was to be paid at maturity into Manhattan's current account at Belgian American Trust. Sweeny also stated that he was forwarding a non-negotiable certificate of deposit in the amount of $500,000 issued by the First National Bank of Boston, which certificate was to be held by Belgian American Trust in safekeeping. There are no allegations respecting the purchaser of this certificate, the source of funds for its issuance, nor any fraudulent activity in connection with it. Again, the complaint alleges that the purpose of this legerdemain was to conceal the actual reduction in Manhattan's assets and to create the misleading impression that Manhattan had $5,500,000 more in unencumbered ssets than it, in fact, did have. (¶34).

Repayment of Belgian American Banking Loans

Sometime in January, 1963, Belgian American Banking made known that it would not renew or extend its loans to New England Note Corporation, which notes fell due on January 24, 1963. (¶35). Accordingly, beginning on or about January 20, 1963, Bourne and Begole initiated another series of camouflaging transactions.

Firstly, Bourne asked Garvin, Bantel to arrange to replace the certificates of deposit which undoubtedly had been carried as assets upon Manhattan's books and the proceeds of which would be required to repay the Belgian American Banking loans. Garvin, Bantel borrowed $5,500,000 from Marine Midland Bank and Trust Co. and delivered the funds to Irving Trust Company. Irving Trust Company,

on January 21, 1963, issued, at Begole's request, certificates of deposit in the amount of $5,500,000, apparently with Manhattan as payee.[8] These certificates were delivered to Garvin, Bantel. (¶36).

Secondly, on January 25, 1963, Belgian American Trust credited Manhattan's account with the proceeds and interest of the two certificates of deposit referred to in Sweeny's letter of August 20, 1962—$5,075,616.44 representing the amount credited with respect to the Belgian American Trust certificate of $5,000,000 and $515,361.18 representing the proceeds of the First National Bank of Boston certificate of $500,000. (¶37).

At Manhattan's request, Belgian American Trust issued a check in the sum of $5,500,000 to Irving Trust Company and charged Manhattan's account.

Irving Trust Company thereupon drew its own check in favor of Belgian American Banking in the amount of $5,250,000 and charged this amount of $5,250,000 against the credit established by the $5,500,000 check which it had received from Belgian American Trust. The Irving Trust Company check in the amount of $5,250,000 was then applied by Belgian American Banking to the New England Note Corporation loans (of $5,000,000 and $250,000) then due and owing to Belgian American Banking. (¶37).

It is alleged that the exchange of checks between Belgian American Trust and Irving Trust Company and between

[8] Paragraph 36 is silent as to the payee of the Irving Trust certificates. However, since paragraph 39 alleges that Irving Trust certified to the State Insurance Department that it was indebted to Manhattan in the amount of $5,500,000 as evidenced by certificates of deposit, and since the alleged scheme of concealing the diminution of assets would not be effective unless the certificates were in Manhattan's name, it is a reasonable assumption that they were so issued.

Irving Trust Company and Belgian American Banking took place at the same time at a meeting held on January 25, 1963 at the office of one (or possibly both) of the Belgian American banks. (¶37).

As a result of these transactions, it now appeared that Manhattan was the payee of a $5,500,000 certificate of deposit (issued by Irving Trust Company) which, however, had been delivered physically to Garvin, Bantel and then undoubtedly used by Garvin, Bantel as security for its loan of $5,500,000 from Marine Midland Bank.[9]

Manhattan also had approximately $90,000 on deposit in Belgian American Trust representing interest earned by the certificate of deposit and a balance of $250,000 in Irving Trust Company representing the difference between the $5,500,000 check received by Irving Trust Company from Belgian American Trust and the $5,250,000 check issued by Irving Trust Company to Belgian American Banking. There are no allegations respecting interest on the Belgian American Banking-New England Note Corporation loans; and it is likely that Manhattan paid this interest by using the cash balances on deposit in Belgian American Trust and Irving Trust.

Other than these possibilities arising from the interest earned by the certificates of deposit and the interest payable on the loans, the Belgian American banks, as of January 25, 1963, do not figure in any financial transaction.

On April 18, 1963, Belgian American Banking returned to Begole and Sweeny the shares of Manhattan stock which

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[9] There are no allegations, however, regarding the pledge or assignment of this certificate as security nor any allegations regarding an assignment or endorsement by Manhattan of the Irving Trust Company certificate of deposit (of $5,500,000) which presumably would be necessary in order to make this certificate acceptable to Marine Midland Bank as security for Garvin, Bantel's loan.

it had received as collateral on the New England Note Corporation loan. (¶38).

Finally, on May 15, 1963, allegedly for the purpose of concealing the diminution of Manhattan's assets, Irving Trust Company certified to the New York State Insurance Department that Manhattan had on deposit at Irving Trust Company $5,500,000, as evidenced by the certificates of deposit (payable to Manhattan) issued by Irving Trust on January 21, 1963. The certification included statements that the certificates of deposit were free of all liens, claims, or incumbrances and were not held as security for any loan. (¶39). These certificates of deposit, as previously noted, had in fact been delivered to Garvin, Bantel.

The net effect of the myriad financial manoeuvres was that an individual (Begole) or a group of individuals (Begole, Bourne, et al.) obtained control of Manhattan by (1) having Irving Trust Company deliver its $5,000,000 check to Bankers Life (the then sole stockholder of Manhattan); (2) receiving all of Bankers Life's shares of Manhattan, and (3) repaying Irving Trust Company by selling Manhattan's portfolio of United States Government securities and forwarding the proceeds plus some additional cash to Irving Trust Company.

In essence, Manhattan's corporate funds that should have been kept available to meet Manhattan's creditors' and policyholders' claims were thus unlawfully used by Begole for the noncorporate, private purpose of enabling Begole (and those in concert with him) to acquire all of Manhattan's shares.

Since Manhattan, a solvent corporation, was thereby rendered insolvent, the corporation itself was victimized. But, inasmuch as Begole was Manhattan's sole stockholder, the

economic injury was to be borne only by Manhattan's creditors and policyholders.

It is impossible to ascertain with any degree of certainty from the face of the complaint who benefitted from the transaction. Bourne, Sweeny, Begole, Garvin or all of them in concert, may have masterminded and gained from the scheme. As previously noted, Bourne, Begole, Garvin, Bantel and Belgian American Banking received various amounts of cash, totalling $225,000, originating out of the $250,000 loan by Belgian American Banking to New England Note Corporation.

Indeed, if Manhattan had a net worth on January 24, 1962 substantially below $5,000,000, Bankers Life may have been the ultimate beneficiary. Resolution of this puzzlement is not required to decide the present motions.

PLAINTIFF'S LEGAL THEORY AND MOVANTS' CHALLENGES

Plaintiff claims that these transactions, when integrated, constitute violations of section 17(a) of the 1933 Act, 15 U.S.C. §77q(a) because all of the defendants, by their respective participation, employed a device, scheme and artifice to defraud Manhattan. The precise applicability of section 17(a) is never articulated in the complaint. Nevertheless, plaintiff's apparent position is that the bootstrap acquisition of control by Begole, Sweeny and Bourne whereby Manhattan's assets rather than outside funds were the source of the purchase price of Manhattan's shares was fraudulent insofar as Manhattan was concerned. Moreover, in order to retain control of Manhattan without disclosing the means of financing the acquisition of the Manhattan shares, defendants, as part of the same scheme, finagled records and executed intricate financial transactions to conceal and suppress the truth.

Bankers Life and the two Belgian American banks have moved to test the legal sufficiency of this theory as applied to the facts alleged in the complaint. More particularly, these defendants seek an order, pursuant to Fed. R. Civ. P. 12(c), (h), granting judgment on the pleadings and dismissing the complaint as to them on the grounds that the Court lacks federal question or diversity jurisdiction; that plaintiff lacks standing to recover damages for violations of section 17(a) of the 1933 Act; and that the complaint fails to state a claim upon which relief can be granted.

In the context of complaints alleging violations of the securities acts, there is no significant distinction between dismissal for lack of jurisdiction and dismissal for failure to state a cause of action. Federal jurisdiction depends on the existence of a federal question, *i.e.*, the violation of a provision of one of the securities acts. Should the Court determine that the facts alleged do not make out a violation of federal law, and consequently fails to state a claim, the Court, in effect, has also determined that there is no federal question, and thus no jurisdiction. *See Britt* v. *Cyril Bath Co.*, 290 F.Supp. 934 (N.D.Ohio 1968). Therefore, the Court will not attempt, as a matter of formal analysis, to deal separately with these two grounds. Because the same issues of law are raised by both grounds, they will be discussed simultaneously.

The Court initially, however, directs its attention to the question of standing which can be decided without reference to the merits of the claim since this attack on the complaint assumes *arguendo* that it does allege an actual violation of the securities acts and that the Court has jurisdiction.

WHO MAY RECOVER FOR ALLEGED VIOLATIONS OF THE ANTI-FRAUD PROVISIONS OF THE SECURITIES ACTS?

Defendants, in their memoranda, claim that plaintiff may not recover for violations of section 17(a) of the 1933 Act because that section gives rise to a cause of action in a defrauded purchaser only, and that it is obvious from the face of the complaint that Manhattan was not a purchaser of its own stock. At oral argument and in its briefs, plaintiff presents a number of arguments in refutation.

Plaintiff's position is that, for purposes of these motions, it is not limited to section 17(a) of the 1933 Act (the only section explicitly alleged to have been violated) but that it is entitled to have the motions denied if it has standing and if it makes out a claim under *any* federal statute. Plaintiff then asserts that section 10(b) of the 1934 Act, 15 U.S.C. §78j(b) (1964) and S.E.C. Rule 10b-5 are also material; that the complaint does state a cause of action under that section; and that plaintiff has standing to sue for damages resulting from violations of section 10(b) of the 1934 Act and section 17(a) of the 1933 Act.

The Court is not restricted to the particular legal theory of recovery or jurisdictional basis alleged in the complaint. If the facts are alleged with reasonable clarity so as to give adequate notice of the transaction, and if plaintiff is entitled to recover under any legal theory, the complaint is sufficient. 1A Barron & Holtzoff, Federal Practice and Procedure §276.1 (Wright ed. 1960); 2A J. Moore, Federal Practice ¶8.14 (2d ed. 1968).

Moreover, because the operative language of section 10(b) and Rule 10b-5 is so similar to that of section 17(a) of the 1933 Act, the Court will consider the applicability of these provisions. *See Hoover* v. *Allen*, 241 F.Supp. 213, 226 n.7 (S.D.N.Y. 1965).

Only a defrauded purchaser may recover under section 17(a) of the 1933 Act. The statute provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

This statute was aimed at fraudulent practices by which sellers of securities could defraud or deceive purchasers. The very purpose of the promulgation of Rule 10b-5 under the 1934 Act was to prohibit individuals or companies from buying securities if they engage in fraud in their purchase. The objective of Rule 10b-5 was to make the same prohibitions contained in section 17(a) of the 1933 Act applicable to purchasers as well as to sellers. *See, e.g., Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461, 463 (2d Cir.), *cert. denied,* 343 U.S. 956, (1952); III L. Loss, securities Regulation at 1423-30 (2d ed. 1961); A. Bromberg, Securities Law: Fraud at 19-20 (1968).

The requirement of being a defrauded purchaser to recover for a violation of section 17(a) has even more recently been upheld. *See, e.g., Schoenbaum* v. *Firstbrook,* 268 F.Supp. 385, 396 (S.D.N.Y. 1967), *aff'd,* 405 F.2d 200

(2d Cir.), *rev'd on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968); *Colonial Realty Corp.* v. *The Curtis Publishing Co.*, CCH Fed. Sec. L. Rep. ¶92, 105 (S.D.N.Y. 1967); *cf. Hoover* v. *Allen*, 241 F.Supp. 213, 223 (S.D.N.Y. 1965).

Rule 10b-5, however, is more expansive than section 17(a) of the 1933 Act. It prohibits fraud or deception by either a purchaser or seller; and its operative language is "in connection with the purchase or sale of any security" as distinguished from the phrase "in the offer or sale of any securities" which appears in Section 17(a) of the 1933 Act.[10] Nevertheless, the standing requirement appears to

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[10] The texts of section 10(b) and Rule 10b-5 are hereafter set forth:

"Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors."

"Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

differ only in that defrauded sellers as well as purchasers are included in the permissible class of potential plaintiffs.

In *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), plaintiff sought to prosecute a derivative suit against the former president and major shareholder of the corporation, who allegedly had violated section 10(b) and Rule 10b-5 in rejecting, as president, an allegedly favorable merger offer and who then sold his stock to another company at a substantial premium. In affirming the district court's dismissal of the complaint, the court, *inter alia*, held that the action could not be maintained in the corporate name in the absence of an allegation that the plaintiff corporation was either a defrauded purchaser or seller of securities. This holding has been consistently applied. *See, e.g., Chasin* v. *Mencher* 255 F.Supp. 545, 548 (S.D.N.Y. 1965) and cases there cited.

Plaintiff contends that *Birnbaum* is no longer controlling doctrine. It argues that recent case law (mostly developed by the Second Circuit) has eroded the validity of *Birnbaum* and the limitation of standing to defrauded purchasers or sellers.

The Court rejects plaintiff's reading of recent decisions. Though there have been, literally, dozens of cases raising the issue since *Birnbaum*, not one has permitted a plaintiff who has been held to be other than a "purchaser or seller" (as those terms have been interpreted) to maintain an action for damages under Rule 10b-5.

In *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), a case much relied on by plaintiff, the court did permit the trustee in bankruptcy to sue in behalf of a corporation whose stock had been issued, without registration, and then publicly distributed by some of the defendants. Plaintiff alleged a violation of Rule 10b-5 in

that the corporation's transfer agent was induced to issue these shares on the basis of fraudulent representations made to the agent by former officers of the bankrupt. The court held that the corporation could maintain its action for the reason that the issuance of stock was a "sale" and since it did not receive full consideration for the valuable shares issued, the corporation was thus a defrauded "seller." *Hooper*, thus, manifestly does not indicate the demise of the purchaser-seller requirement.

Hooper did serve as the genesis for a long string of cases that have permitted corporations to sue for damages when they were the victim of a securities fraud. Yet, in every case, the corporation either qualified as a "seller" since it had issued new shares, or as a purchaser when it redeemed shares or purchased treasury stock.

Other cases are also relied upon by plaintiff to support its thesis that the authority of *Birnbaum* has become attenuated. *Ruckle* v. *Roto American Corporation*, 339 F.2d 24 (2d Cir. 1964), upheld the right of a defrauded *issuer* to recover damages because preventing the perpetration of fraud upon an issuer with the consequent distribution of newly issued and watered stock was one of the chief reasons for the enactment of the securities laws. 339 F.2d at 28. Since an "issuer" is a seller (per *Hooper*), this result is not inconsistent with the *Birnbaum* purchaser-seller requirement. And, although *Ruckle* distinguished *Birnbaum* and *Howard* v. *Furst*[11] on the grounds that the corporations in those cases had not sustained injury, it is clear from the rationale for the *Ruckle* decision that the mere existence of corporate injury was not the crucial, decisive factor; the

[11] 238 F.2d 790 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (shareholders may not sue derivatively for injury growing out of S.E.C. proxy rule violations).

emphasis was on the spread of overvalued securities resulting from the fraud on the corporation.

Nor do the other cases cited by plaintiff support its *Birnbaum* erosion thesis. In *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), the court held that a minority shareholder who, pursuant to a short form statutory merger, was forced either to sell his shares to the surviving corporation or to retain shares in a defunct corporation was a "seller", though he retained his shares. The court specifically disclaimed any intention to depart from the traditional purchaser-seller requirement and decided that, under the particular circumstances, plaintiff was, as a practical matter, a seller.

In *A.T. Brod & Co.* v. *Perlow*, 375 F.2d 393 (2d Cir. 1967), the court reversed the dismissal of a complaint which charged that defendant had employed a scheme in refusing to pay for securities he had ordered from plaintiff-broker. The court noted, explicitly, that plaintiff in that case was a purchaser and thus there was no need to delve into the question of whether a broader standing requirement should be adopted. 375 F.2d at 397 n. 3.

It is true that *Brod* implicitly criticized *Birnbaum* in the statement: "Nor do we think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities'. We believe that §10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception." 375 F.2d at 397. The language the Court of Appeals believed too limited is that of *Birnbaum*.

An analysis of the decision in *Birnbaum*, however, discloses that there were at least two distinct reasons for

dismissing the complaint[12]—the failure of the allegations to state a cause of action, and the lack of standing in the corporation to recover for violations of the securities laws when the corporation was neither a defrauded purchaser nor defrauded seller. The language quoted by *Brod* was the *Birnbaum* court's rationale for dismissal for failure to state a claim; so too, the only issue involved in *Brod* was the question of whether the facts alleged constituted a violation of Rule 10b-5. And thus, while *Brod* must be read as modifying *Birnbaum* on this issue, *Birnbaum's* standing requirements have not been altered.[13]

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[12] One commentator has also noted the tendency to confuse the distinct grounds for decision in *Birnbaum* which results from "an uncritical reading of the general language . . ." *See* A. Bromberg, *supra* at 88.1.

[13] Though not cited by plaintiff to this Court, two other cases have been relied on as authority for the *Birnbaum* "erosion" or "demise" theory. *See* Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era For Rule 10b-5*, 54 Va. L. Rev. 268 (1968). In *Symington Wayne Corp.* v. *Dresser Industries, Inc.*, 383 F.2d 840 (2d Cir. 1967), the court denied, on the grounds of failure to prove irreparable harm, an application for an order enjoining a tender offer allegedly steeped in material misrepresentations and omissions. Though the court reached the merits in a suit brought by the corporation being acquired and two of its shareholders, it specifically refrained from deciding the question of standing. 383 F.2d at 842. In *Mutual Shares* v. *Genesco*, 384 F.2d 540 (2d Cir. 1967), the court did decide that one need not be a purchaser or seller in a suit for an injunction, but held, however, that the trial court's dismissal of the damages claim was correct. *See* 384 F.2d at 547. The injunction was against a continuing deceitful manipulation of the market price of publicly-owned stock; and this conduct was held to create a claim under section 10(b) and Rule 10b-5. The Court explicitly stated that the claim for equitable relief required proof of fewer elements than would a claim for damages.

Lowenfels, *supra*, does not distinguish between the two separate grounds for decision in *Birnbaum;* and thus fails to note that *Brod* modifies *Birnbaum* only with respect to the ground based on failure to state a claim.

Indeed, in *Greenstein* v. *Paul,* 400 F.2d 580 (2d Cir. 1968), the Court of Appeals appeared to foreclose any argument respecting the demise of the *Birnbaum* purchaser-seller requirement:

> "It has long been the rule in this circuit that to maintain an action under §10(b) of the [1934] Act and Rule 10b-5 of the Securities and Exchange Commission the plaintiff must have been a seller of the stock involved. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (C.A. 2, 1952), cert. denied 343 U.S. 956 (1952). Although criticized, Entel v. Allen, 270 F.Supp. 60, 70 (S.D.N.Y., 1967), it is still the rule at least insofar as actions for damages are concerned. Mutual Shares Corp. v. Genesco, Inc., supra."

EXPANSION OF THE PURCHASER-SELLER REQUIREMENT?

Plaintiff argues that, even if the purchaser-seller requirement has not yet been expressly overruled or broadened, the various cases which were cited by plaintiff for that proposition, and discussed by the Court above, at least indicate discontent with the narrow *Birnbaum* rule, forcing the Court of Appeals to choose other means to circumvent its rigors (*e.g.*, interpreting term "seller" broadly). Plain-

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Weitzen v. *Kearns,* 271 F.Supp. 616, 622 (S.D.N.Y. 1967), and *Entel* v. *Allen,* 270 F.Supp. 60, 69 (S.D.N.Y. 1967)—both decided by the same judge—apparently also came to the conclusion that *Birnbaum* was "seriously challenged, if not overruled" by reading *Brod* as questioning *Birnbaum's* holding with respect to standing as well as the scope of Rule 10b-5. However, in *Greenstein* v. *Paul,* 400 F.2d 580 (2d Cir. 1968), the Second Circuit squarely reaffirmed the continuing validity of *Birnbaum* as authority for the rule that to maintain an action for damages under section 10(b) and Rule 10b-5 the plaintiff must have been a seller of the stock involved. *See also Christophides* v. *Porco,* 289 F.Supp. 408 (S.D. N.Y. 1968); *Bound Brook Water Co.* v. *Jaffe,* 284 F.Supp. 702 (D.N.J. 1968).

tiff thus appears to ask this Court to broaden, in an explicit fashion, the standing requirements. Plaintiff refers the Court to the brief of the Securities and Exchange Commission as *amicus curiae* in *Vine* v. *Beneficial Finance Co., supra,* where the S.E.C. argued for such an expansion. Plaintiff argues that this step would eliminate unnecessary complexities, distinctions, and incentives to clever scheming and would achieve greater justice in the individual case. Memorandum of Plaintiff In Opposition to Motions Pursuant to Rules 12(c) and 12(h) Federal Rules of Civil Procedure at 31.

Other reasons have been advanced by commentators for the abandonment of the purchaser-seller prerequisite. *See, e.g.,* Lowenfels, *supra* note 12; Note, *The Purchaser-Seller Rule: An Archaic Tool for Determining Standing Under Rule 10b-5,* 56 Geo. L.J. 1177 (1968).

The rule that this Court is asked to adopt is that anyone who is injured by a violation of the securities acts may sue to recover damages. The Court declines this invitation to expand the traditional standing requirement.

The Court of Appeals has declined to accede to the repeated requests of plaintiffs and *amici curiae* to enlarge the class of potential plaintiffs in actions for damages arising out of violations of Rule 10b-5. In the light of *Greenstein* v. *Paul, supra,* the Court does not discern any imminent doctrinal change by the Court of Appeals. In these circumstances, a district judge may not disregard an established principle of law. Accorlingly, the Court rules that only a defrauded purchaser or seller may sue for damages arising from a violation of section 10(b) of the 1934 Act and S.E.C. Rule 10b-5.

IS PLAINTIFF A DEFRAUDED PURCHASER OR SELLER OF SECURITIES?

The complaint charges a violation of the anti-fraud provisions of the 1933 Act in the purchase and sale of the shares of Manhattan stock on January 24, 1962. (¶¶1, 18, 40). The seller of these shares was Bankers Life and the purchaser was Begole. (¶20). From the face of the pleadings, it thus appears that plaintiff—Manhattan—was neither a purchaser nor a seller of the security (shares of Manhattan stock) which was the subject of the alleged fraud.

At oral argument, however, plaintiff's counsel suggested that—in view of the fact that Begole did not furnish any "fresh" consideration for the purchase of the shares and that, ultimately, it was Manhattan's funds which paid for the shares—Manhattan should be considered the purchaser. (Tr. at 30). While it is true that a corporation can be a purchaser of its own stock within the meaning of the securities laws, *see, e.g., O'Neill* v. *Maytag,* 230 F.Supp. 235 (S.D.N.Y.), *aff'd,* 339 F.2d 764 (2d Cir. 1964), a corporation cannot be the purchaser of *all* of its own stock unless the shares were cancelled and a general dissolution occurred. This is so because a corporation cannot maintain its status as a separate or existing entity (or fictional person) without having another entity or individual serve in the capacity of proprietor or owner.

This Court deems, as a matter of law, the fact that plaintiff may have been the ultimate source of funds for the purchase of Manhattan shares (*i.e.*, the proceeds of the sale of Manhattan's portfolio of United States Government securities were received by Irving Trust Company and credited to Manhattan's account, which thereafter was charged with the $5,000,000 check delivered by Irving Trust Company to Bankers Life) insufficient to establish plaintiff as the purchaser of Manhattan shares because it was never

intended that plaintiff would take title to those shares. This Court holds that, insofar as section 17(a) of the 1933 Act and section 10(b) of the 1934 Act are concerned, a purchaser of securities is one who was a party to a transaction whereby he was to assume ownership of securities in exchange for valuable consideration. Under this definition, plaintiff fails to achieve the status of purchaser and, consequently, may not assert a cause of action for a violation of the securities laws with respect to the purchase and sale of the Manhattan shares.

Though the complaint alleges fraud only in the purchase and sale of the Manhattan shares, plaintiff now adopts the new position that, as a purchaser of a certificate of deposit, and as a seller of United States Government securities, plaintiff has standing to sue in this action (Tr. at 32-35).

Without commenting on the propriety of ruling on the sufficiency of a complaint based on amendatory allegations presented in open court and not formally set forth in the complaint, the Court concludes that if, within the meaning of the securities acts, fraudulent schemes were employed in connection with the sale of Manhattan's portfolio of United States Government securities, plaintiff, *if damaged*, may maintain a suit to recover. Manhattan was a seller of those securities, though management perhaps breached its duties to the corporation in authorizing or ratifying the sale; and, if the corporation was damaged through fraudulent activities, plaintiff may recover damages.

With respect to plaintiff's standing deriving from its alleged "purchase" of various certificates of deposit,[14] the

[14] The Court's discussion of purchases of certificates of deposit does not refer to the $500,000 First National Bank of Boston certificate of deposit, regarding which the complaint is generally devoid of information. From the facts alleged, it does not appear that any fraudulent act was practiced relative to this certificate, and thus the question of standing is irrelevant.

Court is convinced that plaintiff was not a purchaser, despite the fact that it tendered to Belgian American Trust, Irving Trust Company's check for $5,000,000 and received a $5,000,000 certificate of deposit payable to itself. Since, by prearrangement, this certificate was endorsed to New England Note Corporation which delivered it to Belgian American Banking as collateral for the $5,000,000 loan from Belgian American Banking to New England Note Corporation, and the proceeds of this loan were given directly to Irving Trust Company in payment for the $5,000,000 check that had paid for the certificate of deposit, this entire transaction was a "wash" and had no economic reality. As such, Manhattan was not a "purchaser" of a "security" but was merely participating as a conduit for the sole purpose of having its name appear as payee which enabled the fraud to become further camouflaged.

The Court is mindful of the argument that Manhattan's portfolio of United States Government securities was the ultimate source of funds for financing all the transactions in the three certificates of deposit and that the misappropriation of the proceeds of the sale of Manhattan's portfolio constituted the fraud. What is of controlling importance is that the facts as pleaded do not portray Manhattan as the purchaser of the two Belgian American Trust certificates of deposit. Neither Manhattan's portfolio nor the proceeds thereof was the immediate consideration for the issuance of these two certificates.

Nor was Manhattan a purchaser of the third certificate of deposit,—the Irving Trust Company $5,500,000 certificate of deposit which was paid for by the proceeds of the Marine Midland $5,500,000 loan to Garvin, Bantel. Garvin, Bantel and Irving Trust Company were the only parties to the transaction whereby this certificate was issued, al-

though Manhattan was the payee of the certificate. Garvin, Bantel, as previously noted, received physical delivery of the certificate and presumably used this certificate of deposit as collateral for the $5,500,000 loan which initially furnished the consideration for the issuance of the certificate.

Therefore, the Court need not reach the novel and difficult question of whether certificates of deposit of this nature fall within the statutory definition of the term "security".[14a]

[14a] Section 2(1) of the 1933 Act, 15 U.S.C. §77b(1) (1964), defines the term "security" for the purpose of that act to include "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certicate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

Section 3(a)(10) of the 1934 Act, 15 U.S.C. §78c(a)(10) (1964), sets forth the meaning of the term "security" for the purpose of that act:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of any days of grace, or any renewal thereof the maturity of which is likewise limited."

The certificates of deposit in this case were not issued for a security—they were issued for cash and are pieces of paper "evidencing the existence of a time deposit." *S.E.C.* v. *Fifth Avenue Coach Lines, Inc.*, 289 F.Supp. 3, 31 (S.D.N.Y. 1968). Thus, they would not be deemed "securities" as a species of the class of instruments designated in the statute as "certificate of deposit for a security."

The S.E.C., however, has taken the position that the anti-fraud provisions of the securities acts apply to deposit and share accounts in national banks. *See* 31 Fed. Reg. 16, 581, *reprinted in* CCH Fed. Sec. L. Rep. ¶77,421 (1966-67 Transfer Binder).

The Supreme Court, in *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), held that withdrawable capital shares in a state-chartered savings and loan association were "investment contracts" and, consequently, constituted "securities" under the 1934 Act. The Court noted that the term "security" " 'embodies a flexible rather than static principle . . .' " 389 U.S. at 338.

Giving the definition of "security" this liberal reading, a certificate of deposit issued for cash by a bank could be considered the equivalent of an "evidence of indebtedness" and would be a "security" within the meaning of the 1933 Act.

The 1934 Act, however, does not include the term "evidence of indebtedness" in the statutory definition. Conceivably, a certificate of deposit issued for cash by a bank might be deemed an "investment contract" or more likely a "note". But the specific exclusion of "any note, draft, bill of exchange, or banker's acceptance" having a maturity of nine months or less from the definition under the 1934 Act, would appear applicable to a six-months' certificate

of deposit issued for cash by a bank and which evidences a time deposit made at the issuing bank.

DOES THE COMPLAINT ALLEGE FACTS CONSTITUTING A VIOLATION OF THE SECURITIES ACTS?

The Court has expressed its conclusion that plaintiff lacks standing to maintain an action for fraud in connection with the purchase or sale of the Manhattan shares and the three certificates of deposit. Were the Court to follow the consequences of this legal conclusion as to standing, it would be unnecessary for the Court to decide the question of whether the acts charged in the complaint with respect to these particular transactions constitute violations of section 17(a) of the 1933 Act and section 10(b) of the 1934 Act.

However, as the Court has also concluded, plaintiff does have standing to maintain an action alleging fraud in connection with the sale of Manhattan's portfolio of United States Government securities. Consequently, the Court must consider whether the acts charged in the complaint constitute violations of section 17(a) of the 1933 Act and section 10(b) of the 1934 Act with respect to that particular security transaction.

Plaintiff contends that there was but one pervasive fraudulent scheme, and that all of the various security transactions and other financial manoeuvres were interrelated and cumulative. Since the Court must, for present purposes, accept the allegations of the complaint as true, the Court will determine whether the complaint, considered as a whole, charges conduct which violates section 17(a) of the 1933 Act or section 10(b) of the 1934 Act. Therefore, the Court's discussion will be directed to the complaint as a whole and be general in terms. The Court holds that the

allegations of fraud in connection with the sale of Manhattan's portfolio of United States Government securities do no charge conduct violative of the securities acts. The rationale underlying that holding applies equally to the allegations of fraud in connection with the purchase and sale of the Manhattan shares, that is, such allegations do not charge conduct violative of the securities acts. Similarly, if it be assumed that the three certificates of deposit herein constitute "securities" within the meaning of the securities acts, such rationale demonstrates that the allegations of fraud in connection with the purchase of said certificates of deposit do not charge conduct violative of the securities acts.

The gravamen of the complaint is the diminution in Manhattan's assets. This diversion or misappropriation of assets apparently was the essence of the fraud. The allegations describing subsequent conduct charge only that they were designed to conceal the defendants' misdeeds in a maze of numerous intricate and confusing transactions.

A viable claim under Rule 10b-5[15] requires that there have been fraud or deception in connection with the purchase or sale of securities. In interpreting the phrase "in connection with the purchase or sale of any security," it would be relevant to discuss the purpose of the Congressional enactments, and, in so doing, to consider whether the alleged fraud could result in the abuses sought to be curbed or prevented and whether the fraudulent activity otherwise touched on any federal concern.

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[15] On the premise that the more liberal language of Rule 10b-5 is an indication that its scope is more expansive than that of section 17(a) of the 1933 Act, the Court will discuss this issue only in terms of Rule 10b-5. If no claim is established under Rule 10b-5, *a fortiori*, none would exist under section 17(a) of the 1933 Act.

The securities acts, and especially the 1934 Act, were intended to prevent fraud and deception, manipulation and inadequate disclosure in the dissemination and trading of securities. The securities acts are not so much concerned with fraud *per se* as with the effect of fraud upon investors and the public interest in maintaining free and open securities markets. 1934 Act §2(3), 15 U.S.C. §78b(3); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 212 (2d Cir.), *rev'd en banc*, 405 F.2d 215 (2d Cir. 1968); *S.E.C.* v. *Texas Gulf Sulpher Co.*, 401 F.2d 833, 858-60 (2d Cir., *en banc*, 1968); *cf. A.T. Brod & Co.* v. *Perlow, supra.*

In order to sustain a complaint alleging fraud under section 10(b) of the 1934 Act, it must appear with reasonable clarity from the face of the complaint either (1) that a purchase or sale of securities is at the crux of a fraudulent scheme; or (2) that inducing a purchase or sale of securities is the object of a fraudulent scheme; or (3) that fraudulent statements, misstatements, or omissions are made in a manner which is reasonably calculated to influence the investing public, or are of the sort which the reasonable investing public might rely upon; or (4) that the trading process is abused through potential market manipulation or the spread of watered stock.

The purity of the security transaction and the purity of the trading process are the sole objectives of federal concern. Therefore, the consummation of a security transaction as a mere incident of a fraudulent scheme and the mere fact of injury caused by the fraud, in the absence of any possibility that the fraud might materially affect the purity of the security transaction and the purity of the trading process would not make the fraud federally cognizable. *Cf. O'Neill* v. *Maytag*, 230 F.Supp. 235, 239 (S.D. N.Y.), *aff'd*, 339 F.2d 764 (2d Cir. 1964).

Giving the unique factual allegations of the complaint a most liberal reading, the Court concludes that plaintiff was not the victim of "federal fraud" as defined above.[16] A federal claim is not pleaded by allegations that, in the course of a scheme to loot a corporation of its assets, certain security transactions occurred, when these transactions—though contaminated by the overriding evil intent to accomplish the ultimate looting—did not involve fraud or deceit in connection with the sale or purchase of a security.

Manifestly, the sale of Manhattan's portfolio and the purchase of the Manhattan shares were necessary steps toward the ultimate looting of Manhattan's assets. But

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[16] The Court also declines to sustain the sufficiency of the complaint because the injury in this particular case (and thus the benefit of any recovery) was not incurred by anyone who was the subject of federal concern. In view of the unusual fact that the fraud was practiced not upon any member of the "decision-making body" of the corporation (*i.e.*, officers, directors, or shareholders), *see Globus, Inc.* v. *Jaroff*, 266 F.Supp. 524, 529 (S.D.N.Y. 1967); *Simon* v. *New Haven Board & Carton Co.*, 250 F.Supp. 297, 299 (D. Conn. 1966), but only upon creditors and policy holders, it is dubious whether plaintiff corporation was ever defrauded or deceived.

Doubtless, a corporation may be deceived or defrauded even if every member of the board of directors was fully informed of the true facts (or, in factual situations similar to this case, that all of the directors were participants in the scheme). *Schoenbaum* v. *Firstbrook*, 405 F.2d 215 (2d Cir. *en banc*, 1968); *Continental Bank & Trust Co.* v. *Garfinkle*, 292 F.Supp. 709 (S.D.N.Y. 1968). But, as is evident from Judge Hays' dissenting opinion in the three-judge panel decision in *Schoenbaum* v. *Firstbrook*, *supra* (Judge Hays, significantly, having also authored the *en banc* majority opinion reversing the three-judge panel's decision), in such a case, there must be a showing that the directors deceived the shareholders—"the real owners of the property with which the directors were dealing." 405 F.2d at 215.

The highly individualized circumstance present in the case at bar—the lack of injury to shareholders—intensifies the Court's reluctance to hold that the complaint states a claim of federal fraud.

Rule 10b-5 requires the employment of fraud in connection with a security transaction, which is essentially different from the effectuation of a security transaction in connection with a fraudulent activity.[16a]

The complaint, taken as a whole, alleges no more than a common law action for misappropriation of corporate funds by a fiduciary, embezzlement or fraudulent conveyance perhaps, or the distribution of an illegal dividend. None of these actions, in the absence of diversity of citizenship, can be maintained in a federal court.

Ruckle v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964) and *Schoenbaum* v. *Firstbrook*, 405 F.2d 415 (2d Cir., *en banc*, 1968) do not hold otherwise. In *Ruckle*, the corporation proposed to issue its own shares to the president for a less than adequate consideration. A majority

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[16a] The distinction here drawn can be best illustrated by analogy to the general conspiracy statute, 18 U.S.C. §371 (1964), which makes unlawful a conspiracy when one or more of the members of the conspiracy "do any act to effect the object of the conspiracy." In order for conduct to qualify as an overt act under that statute, the conduct need not, of itself, be unlawful, provided it was done to effect the object of the conspiracy. Nevertheless, unless the act done in furtherance of the conspiracy was itself unlawful, although committed for the purpose of furthering the object of the conspiracy, the overt act may not serve as the basis for a criminal prosecution for a substantive crime.

Similarly, in this case, the various security transactions were overt acts committed for the purpose of promoting and effecting the object of the fraudulent conspiracy (*e.g.*, the sale of Manhattan's portfolio of United States Government securities was necessary to effectuate the looting of Manhattan's assets). However, unless such security transactions were independently unlawful—*i.e.*, unless there was fraud in connection with the purchase or sale of a security—they could not serve as the basis for a substantive claim under section 10(b) and Rule 10b-5. As pleaded, the security transactions themselves, when considered from the viewpoint of section 10(b) and Rule 10b-5, were innocuous though constituting overt acts furthering the fraudulent scheme. Consequently, they cannot serve as the independent predicate for liability under section 10(b) and Rule 10b-5.

of the board withheld material information from one of the directors before approval was voted. The court held that the issuance would constitute a violation of Rule 10b-5.

In *Schoenbaum,* the court held that the issuance of stock by a corporation to its controlling stockholder at "vastly inadequate prices," apparently with each board member having full knowledge of the inadequacies (all were named as co-conspirators and defendants), stated a claim for relief under section 10(b) and Rule 10b-5.

The crucial facts in these cases were that, in each, the "fraudulent practice" was deception (whether of directors or shareholders) which directly resulted in the issuance of stock for inadequate consideration, thus creating the danger of the spread of "thin" or "watered" stock. The direct involvement of the deceit with a transaction of securities is fraud "in connection with" the sale of stock, and, consequently, constitutes federal fraud irrespective of whether it also constitutes corporate mismangement. As the three-judge panel in *Schoenbaum* v. *Firstbrook, supra,* stated: "A fraud upon a corporation which has the effect of depriving it of fair consideration for the issuance of its stock would necessarily have the effect of reducing the equity of the corporation's shareholders and this reduction in equity would be reflected in lower prices bid for the shares on the domestic stock market." 405 F.2d at 208.

The facts in the instant case, on the contrary, could not give rise to any of these dangers and do not evidence that the fraud was rooted in a security transaction.

That the complaint in this case states no more than a non-federal common law cause of action becomes even more evident upon consideration of the factual situation and language of the Court of Appeals in *Mutual Shares Corp.*

v. *Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967). Plaintiffs there alleged, *inter alia*, that defendant Genesco, a 94% stockholder in S.H. Kress & Co. had acquired its shares pursuant to a fraudulent conspirary, the purpose of which was to finance its purchases of Kress stock from Kress' own assets and to manage Kress for Genesco's own benefit, appropriating Kress' assets in the meanwhile. After holding that plaintiffs could not maintain an action charging violations of Rule 10b-5 occurring before plaintiffs had acquired their shares, the court stated (as to the period subsequent to plaintiffs' acquisition of shareholder status) that the "fraudulent activities then alleged are primarily corporate abuse and diversion, claims cognizable under state law but not under the Act." 384 F.2d at 546. Only the claim that defendants had "manipulated the market price of Kress stock, keeping dividends to a minimum, in order to force minority shareholders to sell out to Genesco at depressed values," *id.*, stated a good cause of action under Rule 10b-5.

The complaint in this case also fails to allege any actual or potential abuse of the trading process. Since public distribution of watered or valueless stock was not a part of the scheme, and the fraud had no potential manipulative effect on the market, and did not raise the spectre of any other evil which prompted passage of the securities acts or is a subject of federal concern, the factual situation in the instant case differs significantly from those in the cases plaintiff cites as major support for sustaining the validity of its claim.

A.T. Brod & Co. v. *Perlow, supra,* explicitly found that the fraud was federally cognizable because it had a "potentially manipulative effect on the securities market." 375 F.2nd at 397.

Hooper v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961), is also stressed heavily by plaintiff. In that case, an individual named Cage was required to sever his connection with the plaintiff corporation (the nominal plaintiff was the corporation's trustee in bankruptcy) when a new group acquired control. Cage concocted a scheme whereby he induced the plaintiff's transfer agent to issue new shares with a market value of about $700,000 after transferring to the corporation worthless contract rights. The actual fraud appeared to be the false representations made to the transfer agent by certain former officers of the corporation and the phony corporate documents prepared to justify and legitimize the issuance of stock. The scheme also involved the distribution by Cage and his cohorts of this newly issued stock over security markets to unwary members of the investing public. Because the purpose and object of the scheme were to have valuable corporate stock issued to Cage (actually to another corporation controlled by Cage which was liquidated immediately after receiving the stock) in exchange for worthless consideration, and then to distribute the stock publicly, the fraud was definitely "in connection with" the purchase and sale of securities. The scheme induced an unfair sale of securities and it had as a major purpose the spread of watered stock to many investors.

In *Pettit* v. *The American Stock Exchange*, 217 F.Supp. 21 (S.D.N.Y. 1963), a similar scheme was perpetrated when huge amounts of Swan-Finch stock was issued, through various corporate shells, for worthless consideration, and then distributed over the American Stock Exchange. That court noted that the fraud violated Rule 10b-5 because the transaction represented an "abuse of the securities trading process," and because the "heart of this case are two fraudulent transactions in securities." 217 F.Supp. at 25-26.

Each security transaction herein was effected for full and fair consideration with full knowledge in both purchaser and seller as to the value of the securities sold. Where this has occurred Rule 10b-5 is not violated. *See Fleischer, "Federal Corporation Law": An Assessment,* 78 Harv. L. Rev. 1146, 1166 (1965). Only where the security transaction was a "vital aspect of a continuing scheme," should the fact of subsequent misappropriation of the consideration result in a violation of Rule 10b-5. *Compare Cooper* v. *North Jersey Trust Co.,* 226 F.Supp. 972, 978 (S.D.N.Y. 1964), *with S.E.C.* v. *Fifth Avenue Coach Lines, Inc.,* 289 F.Supp. 3, 36-39 (S.D.N.Y. 1968).

The complaint in this case presents no more than a complicated scheme of common law fraud.[17]

Discovery herein has been extensive. The parties have not called to the Court's attention any facts which were not alleged in the complaint and which would, if leave to amend the complaint were granted, state a cause of action under the securities acts. Accordingly, the Court hereby dismisses the complaint as to the movants and hereby directs that judgment be entered for movants. Fed. R. Civ. P. 54(b).

So ordered.

Dated: New York, N. Y.
June 3, 1969.

/s/ WILLIAM B. HERLANDS
William B. Herlands
U.S.D.J.

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[17] Plaintiff instituted such a common law action in New York County Supreme Court in 1965. After joinder of issue, further proceedings in the action were enjoined. The factual allegations of the complaint filed in the state court proceeding are essentially the same as those contained in the complaint herein.

Opinion, Ryan, J., Dismissing the Complaint

[SAME TITLE]

Jurisdiction of the Court to entertain this action is now directly challenged in motions to dismiss made by defendant IRVING TRUST COMPANY and by defendants GARVIN, BANTEL & COMPANY and GEORGE K. GARVIN. (See our memorandum endorsement of June 19, 1968.)

Diversity jurisdiction is not present.

Plaintiff urges that, although the complaint alleges that jurisdiction over the subject matter is based on violations of Section 17A of the Securities Exchange Act of 1933 (15 U.S.C. 77q(a)), jurisdiction also exists under Section 10(b) of the 1934 Act and S.E.C. Rule 10b-5.

Plaintiff was neither a defrauded purchaser nor seller, and he may not plead a claim under Section 10(b) of the 1934 Act and S.E.C. Rule 10b-5. Judge Herlands so held granting the Bankers Life motion to dismiss for lack of jurisdiction (See Judge Herlands' opinion of June 3, 1969). I agree.

The complaint does allege fraud in connection with the sale of Manhattan's U.S. Government securities. The fraud charges was not in violation of the Securities Acts of either 1933 or 1934. The fraud alleged was not in the purchase or sale of securities, but was waste of Manhattan's assets by diversion and misappropriation of its securities. I agree with Judge Herlands that "the complaint in this case presents no more than a complicated scheme of common law fraud" over which there is no independent federal jurisdiction.

Opinion, Ryan, J., Dismissing the Complaint

Motions to dismiss are granted without prejudice to prosecution of the action plaintiff filed and is pending in the Supreme Court, County of New York. Settle appropriate order directing entry of such judgment.

Dated: June 9, 1969.

/s/ SYLVESTER J. RYAN
Sylvester J. Ryan
U.S.D.J.

Judgment Dismissing Complaint as to Bankers Life and Casualty Company, Belgian American Banking Corporation and Belgian American Bank and Trust Company

[SAME TITLE]

The defendants Bankers Life and Casualty Company, Belgian American Banking Corporation and Belgian American Bank & Trust Company, having moved to dismiss the complaint as to them on the grounds (1) for lack of jurisdiction over the subject matter (2) that the complaint fails to state a claim upon which relief can be granted, and (3) plaintiff lacks the requisite standing to recover damages for alleged violations of the 1933 and 1934 Acts, and the said motions having come on to be heard before the Honorable William B. Herlands, United States District Judge, and the Court thereafter on June 3, 1969, having handed down its opinion decision granting the motions and dismissing the complaint as to said defendants for failure to state a cause of action under the securities acts, and the Court having pursuant to Rule 54(b) Federal Rules of Civil Procedure expressly detrmined that there is no just reason for delay of entry of this judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the defendants Bankers Life and Casualty Company, Belgian American Banking Corporation and Belgian American Bank and Trust Company have judgment against the plaintiff Superintendent of Insurance of the State of New York, as Liq-

Judgment Dismissing Complaint as to Bankers Life and Casualty Company, Belgian American Banking Corporation and Belgian American Bank and Trust Company

uidator of Manhattan Casualty Company dismissing the complaint as to them.

Dated: New York, N.Y.
June 4, 1969

/s/ WILLIAM B. HERLANDS
William B. Herlands
U.S.D.J.

JUDGMENT ENTERED: 6-4-69

/s/ JOHN LIVINGSTON
John Livingston
Clerk

Judgment Dismissing Complaint as to Irving Trust Company

[SAME TITLE]

Defendant, Irving Trust Company, having moved for an order pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure dismissing the complaint herein as against defendant Irving Trust Company, directing the entry of final judgment, and the granting of such other and further relief as the Court may deem just and proper, on the grounds that (1) the Court does not have jurisdiction over the subject matter of this action, and (2) the complaint fails to state any claim upon which relief can be granted, and the said motion having come on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, and the Court thereafter, on June 9, 1969, having handed down its decision granting said motion and dismissing the complaint as to defendant Irving Trust Company, and pursuant to Rule 54b of the Federal Rules of Civil Procedure, it being expressly determined that there is no just reason for delay, it is

ORDERED, that the Clerk enter judgment against the plaintiff, the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company dismissing the complaint against defendant Irving Trust Company for lack of jurisdiction; and it is further

ORDERED, that the dismissal of the complaint herein is without prejudice to the prosecution of the action that the

Judgment Dismissing Complaint as to Irving Trust Company

Superintendent of Insurance, as Liquidator of Manhattan Casualty Company, has commenced in the Supreme Court, County of New York.

Dated: New York, New York
June 16, 1969.

/s/ SYLVESTER J. RYAN
Sylvester J. Ryan
U.S.D.J.

Judgment Dismissing Complaint as to Garvin, Bantel & Company and George K. Garvin

[SAME TITLE]

Defendants Garvin, Bantel & Company and George K. Garvin, having moved for an order pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure dismissing the complaint herein as against said defendants on the grounds that: (1) the Court does not have jurisdiction over the subject matter of this action and (2) the complaint fails to state a claim upon which relief can be granted, and said motion having come on to be heard before Honorable Sylvester J. Ryan, United States District Judge, and the Court on June 9, 1969 having handed down its decision granting said motion, it is

ORDERED, that the clerk enter judgment against plaintiff dismissing the complaint against defendants Garvin, Bantel & Company and George K. Garvin for lack of jurisdiction, and it is further

ORDERED, that the within motion to dismiss is granted without prejudice to the prosecution of the action plaintiff has commenced in the Supreme Court, County of New York.

Dated: New York, New York
June 17, 1969

/S/ SYLVESTER J. RYAN
U.S.D.J.

Judgment Entered 6-24-69

/S/JOHN LIVINGSTON, *Clerk*

Notice of Appeal

[SAME TITLE]

Notice is hereby given that the Superintendent of Insurance of the State of New York as Liquidator of Manhattan Casualty Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from:

1. The order granting the motion of defendants Bankers Life and Casualty Company, Belgian American Banking Corporation and Belgian American Bank & Trust Company to dismiss the complaint and the judgment entered thereon on the 4th day of June, 1969;

2. The order granting the motion of defendant Irving Trust Company to dismiss the complaint pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure and the judgment entered thereon on the 17th day of June, 1969; and

3. The order granting the motion of defendants Garvin, Bantel & Company and George K. Garvin to dismiss the complaint pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure and the judgment entered thereon on the 23rd day of June, 1969.

Dated: New York, New York
June 27, 1969

ARNOLD BAUMAN

Opinion of the Court of Appeals Affirming the Dismissals of the Complaint

[SAME TITLE]

BLUMENFELD, *District Judge*:

Appellant Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company (Manhattan), commenced this action in 1963 alleging violations by ten defendants of § 17(a) of the Securities Act of 1933. On September 10, 1968, defendants Bankers Life and Casualty Company (Bankers Life), Belgian American Bank & Trust Company (Belgian Trust), and Belgian American Banking Corporation (Belgian Banking) moved to dismiss the action before the late Judge Herlands. On October 1, 1968, defendants Irving Trust Company (Irving), Garvin, Bantel & Company (Garvin, Bantel), and George K. Garvin made similar motions before Judge Ryan. On June 4, 1969, Judge Herlands entered judgment dismissing the action as to Bankers Life, Belgian Trust, and Belgian Banking. His thorough and considered decision granting the motions of these defendants is set out at 300 F. Supp. 1083 (S.D.N.Y. 1969). Shortly thereafter, on June 17, 1969, Judge Ryan, concurring in the reasoning of Judge Herlands' opinion, entered judgment dismissing the action as to Irving, Garvin, Bantel, and George K. Garvin. It is from these judgments that the Superintendent appeals. We affirm.

Opinion of the Court of Appeals Affirming the Dismissals of the Complaint

I. *Facts*

Manhattan was a casualty insurance company wholly owned by defendant Bankers Life and operated by it as a subsidiary. In January 1962 two individuals, defendants Standish T. Bourne and James F. Begole, both now deceased, and not involved in this appeal, agreed to purchase all the stock of Manhattan. On January 19, 1962, a contract was executed between Begole as purchaser and Bankers Life as seller, providing for the sale of the Manhattan stock for $5,000,000 on January 24, 1962. On that day, Begole, John F. Sweeny[1] and C. Joseph Gunter, an officer of Irving, went to Manhattan's office for the closing. Pursuant to plans made in advance of the closing, Gunter tendered an Irving check for $5,000,000 to an officer of Bankers Life and, in exchange, all of the shares of Manhattan stock were given to Begole.

This transaction between Bankers Life and Begole still remains unchallenged because neither the former, as seller, nor the latter, as buyer, has brought any action seeking damages or any relief, one against the other. In this lawsuit our attention has been shifted away from that conventional purchase and sale of the Manhattan stock to the

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[1] At oral argument in the district court, it was learned that Manhattan ousted Sweeny from the presidency of Manhattan at about the time that Bankers Life decided to sell the Manhattan stock, and that subsequent to the ouster Sweeny established contact between Begole and Bourne and Bankers Life. Judge Herlands concluded:

> "Probably at that time, Sweeny also arranged with Begole and Bourne that he should be reinstated as president of Manhattan when, and if, Begole and Bourne acquired control of Manhattan." 300 F. Supp. at 1087 and n. 4.

legerdemain employed by the buyer to obtain the $5,000,000 with which to pay for the stock.[2]

Following the closing, but on the same day, United States Government securities (Treasury bonds) from Manhattan's portfolio were sold[3] and the proceeds, amounting to $4,854,552.67, plus enough cash to bring the total to $5,000,000, were credited to an account in the name of Man-

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[2] The details of financing the purchase of Manhattan stock were apparently the responsibility of Bourne. He engaged the services of defendant George K. Garvin and the latter's firm of money brokers (Garvin, Bantel), who had arranged in advance for the above transaction as well as those to follow.

[3] The complaint is silent as to the source of authority for this sale of securities from Manhattan's portfolio. Noting that fact, Judge Herlands stated:

> "Conceivably it was [Sweeny, apparently installed as president of Manhattan after the stock changed hands] who directed the Chemical Bank to deliver Manhattan's portfolio of . . . securities to Irving Trust, authorized the sale of these securities and then transferred Manhattan cash to Irving Trust in order to cover completely the $5,000,000 Irving Trust check payable to Bankers Life." 300 F. Supp. at 1089.

He also noted the possibility that a board of directors might have been named, which in turn met and appointed Sweeny as president and granted him authority to effect the transactions on Manhattan's behalf. *Id.* at 1089 n. 6.

Appellant vigorously contends that this represents a serious misunderstanding of fact vital to his theory of recovery. His contention is that the sale of Treasury bonds was authorized by resolution of the board of directors on the basis of a representation that the sale of bonds and purchase of a certificate of deposit was merely a change in the company's investment portfolio. Although every minute detail of the pretenses used by Begole and his associates to mask their fraudulent activity may not have been adduced from the complaint or from the other parts of the record as augmented after some six years of discovery, we are satisfied that the able district judges overlooked nothing that would affect the character of the claim.

hattan at Irving, and the $5,000,000 Irving check was then charged against this account. As a result of this first series of transactions, Bankers Life had received $5,000,000 in exchange for the Manhattan stock, Begole and Bourne owned the stock, and Manhattan's assets, having been used to purchase the Manhattan stock, had conesquently been reduced by $5,000,000.

In order the conceal the depletion of Manhattan's assets,[4] the individuals now in control of Manhattan had a neatly prepared ruse ready at hand. At Garvin's request, Irving issued a second check for $5,000,000 payable to Belgian Trust. Sweeny, president of Manhattan, used this check to buy a $5,000,000 six-month's certificate of deposit from Belgian Trust payable to Manhattan. That certificate was then endorsed by Sweeny as president of Manhattan to New England Note Corporation (New England) and delivered to Bourne, president of New England. Bourne then endorsed and delivered it to Belgian Banking as collateral for a six-month's $5,000,000 loan from Belgian Banking to New England. The proceeds of this loan were then delivered to Irving to cover its $5,000,000 check drawn to the order of Belgian Trust.

To recapitulate, there were two sets of telescoped transactions—all completed on the same day:

A. All of Manhattan's shares were purchased from Bankers Life for $5,000,000, borrowed from Irving. After

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[4] The financial ability of corporations engaged in the business of liability insurance to meet claims against its policyholders is subject to regulation under the laws of New York. Their books are open to regular inspection by experts in that business employed by the insurance department of the State of New York.

thus gaining control of Manhattan, the purchaser sold government bonds out of Manhattan's portfolio and used the proceeds to pay off the loan from Irving.

B. To conceal the above depletion of Manhattan's assets, the new owners of Manhattan and those they put in control arranged for a second loan from Irving for $5,000,000. With this they bought a $5,000,000 certificate of deposit from Belgian Trust in the name of Manhattan, and assigned that to New England (Bourne). New England endorsed it to Belgian Banking as security for a $5,000,000 loan to New England. The proceeds were then used to repay Irving's second loan. However, Manhattan's books reflected only the sale of its government bonds and the purchase of the certificate of deposit. Manhattan's records did not show (1) that the proceeds of the sale of these bonds were used by Begole to pay for his purchase of Manhattan's shares or (2) that the certificate of deposit had been assigned to New England and by it pledged to Belgian Banking.

The loans and certificates outlined in *B.* were twice renewed. The first renewal was in July 1962. In January 1963, when Belgian Banking refused to renew its loan to New England a similar round robin set of transactions was effected by substituting Marine Midland Trust Company to perform Belgian Banking's role. In April 1963 the New York Insurance Department discovered the inadequacy in Manhattan's assets and placed the company in liquidation.

II. *Appellant's Claims*

The complaint alleges that the foregoing related transactions constituted one or more violations of § 17(a) of

the 1933 Act, 15 U.S.C. § 77q(a).[5] The district court properly considered as well the applicability to the pleaded facts of § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b)[6] and of S.E.C. Rule 10b-5[7] promulgated thereunder. See *Hoover* v. *Allen*,

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[5] Section 17(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[6] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[7] Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

241 F. Supp. 213, 226 n. 7 (S.D.N.Y. 1965). On appeal, appellant claims the pleaded facts, as well as those otherwise contained in the record, establish his right to recover under one or both of these sections for fraud perpetrated (1) in connection with the purchase and sale of the Manhattan stock, (2) in connection with the sale of Treasury bonds from Manhattan's portfolio, and (3) in connection with transactions involving certificates of deposit and occurring after January 24, 1962. We disagree and affirm the decision of the district court.

III. *Sale of Manhattan Stock*

Section 17(a) of the 1933 Act provides a cause of action only for a defrauded purchaser. *Schoenbaum* v. *Firstbrook*, 268 F. Supp. 385, 396 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 200 (2d Cir.), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied* sub nom. *Manley* v. *Schoenbaum*, 395 U.S. 906 (1969). Section 10(b) of the 1934 Act and Rule 10b-5 extend a similar right to a defrauded seller as well as to a purchaser of securities. *Greenstein* v. *Paul*, 400 F.2d 580, 581 (2d Cir. 1968); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461, 463 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952); see *Christophides*

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the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security."

v. *Porco*, 289 F. Supp. 403, 406 (S.D.N.Y. 1968).[8] Bankers Life was the seller of the Manhattan stock; Begole the purchaser. There is no theory under which Manhattan, in whose shoes this appellant stands, may be regarded as either the purchaser or the seller of Bankers Life's Manhattan stock. Consequently the appellant does not fall within the classes of those for whom a cause of action is created either by § 17(a) of the 1933 Act or § 10(b) of the 1934 Act for damages incurred as a result of that transaction.

IV. *Sale of Manhattan's Treasury Bonds*

Another thrust of this appeal is that the district court erred in holding that no federal cause of action was stated with respect to the purchase or sale of Treasury bonds from Manhattan's portfolio. Appellant's claim that Manhattan is entitled to federal relief as the defrauded seller of those bonds was presented to the district court only as "amendatory allegations presented in open court and not formally set forth in the complaint." 300 F. Supp. at 1098. Moreover, the alleged facts presented in support of the claim on appeal do not appear anywhere in the complaint.

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[8] Although there has been some judicial expansion of the category of persons who may be considered "purchasers," cf. *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393 (2d Cir. 1967), or "sellers" see *Vine* v. *Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *Hooper* v. *Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961), nothing in the cited cases undermines the now well-settled purchaser-seller rule in *Birnbaum*, especially in view of its recent reaffirmation in *Greenstein*. But see, *Weitzen* v. *Kearns*, 271 F. Supp. 616, 622 (S.D.N.Y. 1967); *Entel* v. *Allen*, 270 F. Supp. 60, 69 (S.D.N.Y. 1967).

See note 3, *supra*. Assuming that they are properly before us, and also that they are true, *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 732 (1961), we hold that appellant has not made out a claim cognizable under the federal Securities Acts.

Briefly stated, appellant's claim is that a majority of the board of directors of Manhattan was deceived by misrepresentations of other members of the board and some of the defendants that the sale of the bonds was intended only to effectuate a substitution of those assets for a certificate of deposit equal in value; that in fact the certificate of deposit so substituted was collateralized to its full face value in favor of an unrelated corporate entity; and that on the basis of the fraudulent representations, the board was deceitfully induced to authorize the sale of the bonds in exchange for a certificate without value to the corporation.

What distinguishes the fraud perpetrated on Manhattan in this case from one cognizable under Rule 10b-5 is that its sole object was to obtain possession of Manhattan's government bonds for the personal use of the perpetrators. No doubt the deception was successful, for had the board known that Sweeny and his associates intended to misappropriate the proceeds for their own use it undoubtedly would not have authorized their sale. But that deception did not infect the subsequent sales transaction. With respect to the terms of the sale itself neither the purchaser nor the seller of the bonds was deceived or defrauded. Cf. *Ruckle* v. *Roto Am. Corp.*, 339 F.2d 24 (2d Cir. 1964); *Globus, Inc.* v. *Jaroff*, 266 F. Supp. 524 (S.D.N.Y. 1967); *Simon* v. *New Haven Board & Carton Co.*, 250 F. Supp. 297 (D. Conn. 1966). Indeed, it is no part of the liquida-

tor's claim that the full and fair market price was not paid for those bonds by their purchaser. The fraud which harmed the plaintiff consisted of the failure of Sweeny and his associates to account for the proceeds. There is a structural difference between the sale of the corporation's bonds at a concededly fair price and the subsequent fraudulent misappropriation of the proceeds received.

Rule 10b-5 was not intended to provide a remedy for schemes amounting to no more than "fraudulent mismanagement of corporate affairs." *Birnbaum* v. *Newport Steel Corp., supra,* 193 F.2d at 464. The scope of the rule must be assessed in light of the purposes of the legislation from which it derives, which we recently found to be "to promote free and open public securities markets and to protect the investing public from suffering inequities in trading . . ." *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 858 (2d Cir. 1968) (*en banc*), *cert. denied* sub nom. *Coates* v. *SEC,* 394 U.S. 976 (1969). In that case, we construed the "in connection with" requirement of Rule 10b-5 as follows:

> "Therefore it seems clear from the legislative purpose Congress expressed in the Act, and the legislative history of Section 10(b) that Congress when it used the phrase 'in connection with the purchase or sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *Id.* at 860.

See *Heit* v. *Weitzen,* 402 F.2d 909, 913 (2d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969).

Opinion of the Court of Appeals Affirming the Dismissals of the Complaint

The fraud alleged in this case in no way affected either the securities markets or the investing public. No stockholders were defrauded, no investor injured. The purity of the security transaction and the purity of the trading process were unsullied. There was no danger that the securities sold would be overvalued on reaching the public markets. Cf. *Ruckle* v. *Roto Am. Corp., supra,* 339 F.2d at 28.

Despite the power of the Commission to promulgate rules "appropriate in the public interest or for the protection of investors," § 78j(b), the scope of the rule in fact promulgated is expressly limited to protection against fraud or deceit "in connection with the purchase or sale of any security." Rule 10b-5. Although in the broadest sense the public interest is involved when a corporation which is subject to regulation by the state Superintendent of Insurance is defrauded, the public interest cognizable by § 10(b) is limited to preserving the integrity of the securities markets. The civil liberties provisions of the federal Securities Acts, beginning in 15 U.S.C. § 77(*l*) were "part of a broad integrated program designed to obtain honest dealings in securities," *Wilko* v. *Swan,* 127 F. Supp. 55, 58 (S.D.N.Y. 1955), not one to create an unlimited federal right of action for damages for all who have been defrauded in any area of economic activity. The condition imposed by Rule 10b-5 that the fraud be in connection with the purchase or sale of a security is wholly consistent with that program. Thus, we do not decide that the creditors of Manhattan do not have any remedy under general state tort law for the fraud practiced on their debtor, but only that the federal Securities Acts have not provided a federal forum for its enforcement.

Opinion of the Court of Appeals Affirming the Dismissals of the Complaint

V. *Transactions Involving Certificates of Deposit*

Appellant also contends that Manhattan was defrauded in connection with both purchases and sales of various six-month certificates of deposit exchanged after January 24, 1962. These transactions, which were integral parts of the scheme[9] to conceal the prior depletion of Manhattan's assets, are sufficiently described in the opinion below and need not be fully restated here. The conclusion we have reached that the sale of Manhattan's Treasury bonds did not present a federal cause of action applies equally to these transactions. The certificates of deposit or their proceeds may have been fraudulently misapplied, but there was no fraud in connection with their purchase or sale. In each instance they were bought and sold for their full face amount.

Since we have considered those facts appellant would include in an amendment of his complaint in reaching our conclusion that a claim for relief under the federal Securities Acts is not alleged, we also affirm the district court's denial of the motion to amend.

Affirmed.

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[9] Although the plaintiff contends that it is clear that liability would attach at any one of a number of junctures along the path that led to the liquidation of Manhattan, it expressly disclaims the right to separate recoveries for each of these "separate and distinct fraudulent schemes."

Opinion of the Court of Appeals Affirming the Dismissals of the Complaint

HAYS, *Circuit Judge* (dissenting):

Plaintiff has succeeded to all the rights of Manhattan and is the proper person to assert those rights. See *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195, 206-07 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961), where plaintiff was the defrauded corporation's trustee in bankruptcy.

Manhattan was the victim of a "scheme . . . to defraud" (Rule 10b-5). Judge Blumenfeld has adequately described that scheme. Since the vital center of the scheme, the vehicle for the perpetration of the fraud, was the sale of Manhattan's stock, it seems to me to be completely unrealistic to say that the fraud was not committed "in connection with the purchase or sale of any security."

This court has repeatedly indicated its intention to give a broad and liberal interpretation to Rule 10b-5 in order to assure that that provision is used to accomplish the beneficient purposes for which the statutes governing sales of securities were enacted. See *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967); *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393 (2d Cir. 1967); *S.E.C.* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (*en banc*), cert. denied sub nom. *Coates* v. *S.E.C.*, 394 U.S. 976 (1969); *Schoenbaum* v. *Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), cert. denied sub nom. *Manley* v. *Schoenbaum*, 395 U.S. 906 (1969); *S.E.C.* v. *Great American Industries, Inc.*, 407 F.2d 453 (2d Cir. 1968) (*en banc*), cert. denied, 395 U.S. 920 (1969). In our most recent expression on the subject, we said that "[t]he purchase-sale requirement must be interpreted so that the

broad design [of the statutes] . . . is not frustrated by the use of novel or atypical methods" and we quoted from *S.E.C.* v. *Texas Gulf Sulphur, supra,* the following language *inter alia*: "the courts, as they should, have broadly construed the statutory phrase 'in connection with the purchase or sale of any security.'" *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798 & n. 14 (1969).

In my opinion, the purposes of the statutes would be best accomplished here by recognizing plaintiff's standing to enforce the duties created by those statutes.

Judgment of the Court of Appeals Affirming the Dismissals of the Complaint

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. PAUL R. HAYS,
Circuit Judge

HON. M. JOSEPH BLUMENFELD,
District Judge

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and order of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

/s/ A. DANIEL FUSARO
Clerk

Filed: July 22, 1970

Order of the Court of Appeals Denying Petition for Rehearing

[SAME TITLE]

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

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J. EDWARD LUMBARD

.....

M. JOSEPH BLUMENFELD
per J.E.L.

.....

I dissent and vote for rehearing

/s/ PAUL R. HAYS

September 30, 1970

Order of the Court of Appeals Denying Petition for Rehearing *In Banc*

[SAME TITLE]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

September 30, 1970

Order of the Supreme Court of the United States Allowing Certiorari

[SAME TITLE]

ORDER ALLOWING CERTIORARI. Filed March 22, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Alexander Kosloff, Insurance Department Hearings

• • • • •

[24] Q. Let me run through this step by step and perhaps we can reconstruct it. Were you familiar with the sale of U. S. Government obligations by Manhattan Casualty before January 1, 1962, or during the month of January 1962? A. I was familiar to this degree, that as a member of the Board of Directors I, together with the rest of the Board, voted approval of a resolution to sell Government obligations to the extent of $5 million dollars and to deposit them under a CD with the Belgian American Bank.

Q. Were you aware that the resolution called for the deposit of these funds in the Belgian American Trust Company? A. Yes, that was the resolution we voted.

• • • • •

Sanford Peyton Stallworth,
Insurance Department Hearings

• • • • •

[131] . . . Was there any discussion amongst you members of the Board of Directors as to why the company was putting $5 million dollars in to Belgian American Bank & Trust Company? A. No. It was merely an investment per se, and I knew it was a good investment.

• • • • •

Q. That $5 million dollars came, you say, either from mortgages or Government bonds, but it came from the sale of some securities of the Manhattan Casualty Company, is that right? A. That's right, yes.

Edgar Bloch, Insurance Department Hearings

* * * * *

[51] Q. Why were the government bonds sold in January of '62? A. Well what was brought forth at that Directors' meeting was that it was anticipated the government would come out with a 5% bond and the purpose of selling the lower [52] coupon bonds and putting the money in a certificate of deposit was to put the company in a position to invest in the 5% bond if it became available.

Q. Who made that statement? A. Well it was proposed either by Mr. Begole or Mr. Sweeny, I am not sure, I think it was Mr. Begole.

* * * * *

[54] Mr. Perrotta: This is a statement by Mr. Bloch in answer to a question by Mr. Oster who at the meeting of the Board of Directors in January of 1962 was actively supporting the resolution for the purchase of time deposits from the Belgian American Bank.

Witness: My recollection is that it was Mr. Begole.

Samuel Adams, Deposition

* * * * *

[72] Mr. Marcheso: Would you identify the exhibits that you were reading from?

A. Exhibit 18, Belgian American Exhibit 18. Then the directors' meeting, there was a vote to sell certain securities held by the company and to purchase a certificate of deposit from Belgian American Bank, and the next item was voting the Belgian American Bank authorization form.

* * * * *

[77] Q. Shall we take them up one by one? What was the first vote? A. The first vote was to sell enough securities to purchase a certificate of deposit from the Belgian American Bank in the amount of $5 million.

Q. That resolution was passed? A. Yes.

Q. What securities were to be sold? A. I believe they were mostly Government bonds and I believe there were some other corporate bonds. I am not sure.

* * * * *

[287] Q. Just tell us what happened. A. I said that we would need a vote to sell securities held by Manhattan and to use the proceeds to purchase a certificate of deposit from the Belgian American Bank in the amount of $5 million. I believe the interest rate was stated but I don't recall whether I stated it or Mr. Begole stated what the interest rate was. That was noted.

* * * * *

Alexander Kosloff, Deposition

* * * * *

[134] Q. That's all right. You can just go right ahead and do it, if you like.

What happened then?

Let me ask you, was a proposal made in that directors' meeting to sell the company's Government portfolio in its entirety, except for those bonds which were on deposit with regulatory authorities? A. There was a proposal to sell the portfolio of U. S. Government bonds held in the custody of the Chemical Bank, New York Trust Company.

Q. Who made that proposal? A. I believe it was Mr. Begole. Again, I am not positive, but I think it was Mr. Begole.

* * * * *

[135] Q. And so is it fair to say that it was a matter of deep interest to you as a director and member of the investment committee, this proposal to sell the entire portfolio of Manhattan's Government bonds? A. Sir, the question of the depth of interest is something that you are proposing. I would say, of course, the matters dealing with Manhattan Casualty Company, all of them, were matters of interest to me.

Q. Well, what was said about this proposal that you think was made by Mr. Begole in the directors' meeting to sell the entire portfolio of Government bonds belonging to Manhattan? A. Again, it is very difficult to remember all of it, [136] but there was some discussion by Mr. Begole with respect to the projection of the bond market in general.

Q. What did he say? A. Well, it was a rather pessimistic view.

Q. What did he say? A. I can't recall the language he used.

Q. To the best of your recollection, in general terms, not his exact words, what was the substance? A. Generally, the substance being that the bond market for U. S. Government bonds didn't look too good in the future, and that the purchase of a certificate of deposit would provide a guaranteed income, and a measure of safety. There was general language to that effect.

• • • • •

Sweeny, Deposition

* * * * *

[161] A. No. The meeting continued and the first order of business, Adams put forth a resolution to the board to sell the company's government portfolio in its entirety except for those bonds which were on deposit with regulatory authorities, and out of the proceeds of that sale to purchase a five million dollar certificate of deposit from the Belgian American Bank.

Q. Was this motion carried? A. It was carried. I don't know who seconded the motion, but I know it was carried.

* * * * *

[596] Q. Did you know that before? A. I was under the impression originally that the five million dollars would already be in Belgian American Bank, because of the resolution of sale at the board meeting.

Q. The resolution of sale of what? A. Of the securities.

Q. In other words, you were under the impression that the securities would be sold and the proceeds immediately deposited to Belgian American Bank. A. Yes, because the certificate of deposit, which was also authorized at the board meeting, it was specifically stated that it would be issued by Belgian American Bank.

Q. Where did you get the information that Belgian American Bank was to issue a certificate of deposit, Mr. Sweeny? A. From Mr. Adams. He put it in a resolution form.

* * * * *

Exhibit—Excerpts From Minutes of a Special Meeting of the Board of Directors of Manhattan Casualty Company

A Special Meeting of the Board of Directors of MANHATTAN CASUALTY COMPANY was held at the offices of the Company, 116 John Street, Borough of Manhattan, City of New York, at 12:30 o'clock in the afternoon on the 24th day of January, 1962.

PRESENT:

SAMUEL ADAMS
JAMES F. BEGOLE
EDGAR BLOCH
CHARLES I. HOGAN
MILTON KATZ
ALEXANDER KOSLOFF
JACOB J. MILMAN
F. PAUL MORGAN
S. PEYTON STALLWORTH
JOHN F. SWEENY
RALPH A. TANGUAY
GUY E. WYATT

The meeting was called to order and presided over by Mr. James F. Begole.

Mr. Alexander Kosloff acted as Secretary of the meeting.

The Secretary announced that Notice of the Special Meeting had been given to the Directors in person and that twelve (12) of the thirteen (13) Directors were present and constituted a quorum.

* * * * *

The Chairman then submitted to the Board the matter of effecting a change in its portfolio of securities.

Exhibit—Excerpts From Minutes of a Special Meeting of the Board of Directors of Manhattan Casualty Company

After discussion, and on motion duly made, seconded and carried, it was

RESOLVED, that the President be and he hereby is authorized to sell the entire portfolio of UNITED STATES GOVERNMENT BONDS and NOTES held in custody by the CHEMICAL BANK NEW YORK TRUST COMPANY, at 100 Broadway, New York, N.Y.; and be it

FURTHER RESOLVED, that the President be and he hereby is authorized to purchase a CERTIFICATE OF DEPOSIT from the BELGIAN-AMERICAN BANK AND TRUST COMPANY, not exceeding a face value of FIVE MILLION and 00/100 ($5,000,000.00) DOLLARS, for a term of six (6) months, with interest at 3% per annum, which Certificate of Deposit is to be held in trust for the account of the Company upon receipt of a letter from the Belgian-American Bank and Trust Company certifying to the above.

* * * * *

Complaint Filed in State Court Action

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorney, Arnold Bauman, as and for his complaint herein respectfully alleges:

1. Plaintiff is the Superintendent of Insurance of the State of New York. On May 24, 1963, by order of the Supreme Court of the State of New York, Plaintiff, as said Superintendent of Insurance, was appointed Liquidator of Manhattan Casualty Company. As Liquidator, he is vested with title to all property, contracts and rights of action of Manhattan Casualty Company.

2. Defendant, Bankers Life & Casualty Company (hereinafter referred to as "Bankers Life") is a corporation organized and existing under the laws of the State of Illinois.

3. Defendant Irving Trust Company (hereinafter referred to as "Irving Trust"), is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1 Wall Street, City and State of New York.

4. Defendant, Belgian American Banking Corporation (hereinafter referred to as "BA Banking"), is a corporation organized and existing under the laws of the State

of New York, with its principal place of business at 52 Wall Street, City and State of New York.

5. Defendant, Belgian American Bank and Trust Company (hereinafter referred to as "BA Trust") is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 52 Wall Street, City and State of New York.

6. Defendant, Garvin, Bantel & Company (hereinafter referred to as "Garvin, Bantel"), is a partnership engaged in the transaction of business within the State of New York, with its principal place of business at 120 Broadway, City and State of New York.

7. Defendant, New England Note Corporation (hereinafter referred to as "New England Note") formerly New England Acceptance Co., Inc., is a corporation organized and existing under the laws of the State of Massachusetts.

8. Defendant, George K. Garvin (hereinafter referred to as "Garvin"), is a citizen of the State of New York, residing at 30 East 65th Street, New York, New York, and was at all times hereinafter referred to, a partner in Garvin, Bantel.

9. Defendant, James F. Begole (hereinafter referred to as "Begole"), is a citizen of the State of New York, residing at 1169 Hardscrabble Road, Chappaqua, New York.

10. Defendant, John F. Sweeny (hereinafter referred to as "Sweeny"), is a resident and citizen of the State of New Jersey.

State Court Complaint

11. Defendant, Standish T. Bourne (hereinafter referred to as "Bourne"), is a resident and citizen of the State of Massachusetts.

As and for a First Claim for Relief Plaintiff Alleges Upon Information and Belief:

12. Manhattan Casualty Company (hereinafter referred to as "Manhattan") was incorporated under the laws of the State of New York, on January 13, 1949, and commenced business on June 1, 1949. It was authorized as of May 23, 1963, to transact the following kinds of insurance business as defined in Section 46 of the Insurance Law of the State of New York; accident and health, fire, miscellaneous property, water damage, burglary and theft, glass, elevator, collision, personal injury liability, property damage liability, workmen's compensation and employers' liability, fidelity and surety, motor vehicle and aircraft and marine insurance (excluding ocean marine insurance and insurance against loss or damage by reason of injury to the person). In addition, Manhattan was authorized by the United States Department of Labor to write compensation insurance provided under the Federal Longshoremen's and Harbor Workers' Compensation Act.

13. As of December 31, 1962, Manhattan was authorized to transact business in the States of Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia.

14. During all the times hereinafter referred to, Manhattan had its principal office at No. 116 John Street, City and State of New York.

15. On May 24, 1963, the corporate charter of Manhattan was forfeited, surrendered and annulled and Manhattan was dissolved by order of the Supreme Court of the State of New York, held in and for the County of New York (Honorable Peter A. Quinn, Justice).

16. In November, 1961, Bankers Life was the owner of all the outstanding shares of Manhattan. The shares so outstanding consisted of 100,000 shares of prior preferred stock, 10,000 shares of preferred stock and 180,000 shares of common stock.

17. Commencing in or about November, 1961, in connection with and in furtherance of a sale of said shares, the defendants and/or their officers, agents and representatives unlawfully and with a fraudulent intent conspired and connived to defraud Manhattan, its creditors and policyholders and to that end employed a device, scheme and artifice by which they were able to despoil Manhattan of its assets and dispose of the same to their individual benefit and profit.

18. In pursuance of said scheme to defraud, Bourne and Begole between November, 1961, and January 19, 1962, negotiated for the purchase of said outstanding shares of Manhattan with Sweeny, James W. Bourland (hereinafter referred to as "Bourland"), Vice-President of Bankers Life, and others.

19. On January 19, 1962, a contract of sale for the said shares was entered into between Begole, as purchaser, and Bankers Life, as seller, of the shares of Manhattan. It provided that the price to be paid Bankers Life was $5,000,000, by bank or certified check, which was to be delivered at the

closing on January 24, 1962. The contract was executed for Bankers Life by Bourland, as Vice-President; for Manhattan by Bourland, as Executive Vice-President, and by Begole.

20. Between January 19, 1962, and January 24, 1962, Bourne informed Begole that he would provide Begole with the funds necessary to purchase Manhattan.

21. At the request of Bourne and in furtherance of said scheme, Garvin arranged with BA Trust to issue a certificate of deposit for $5,000,000 in the name of Manhattan, and arranged with BA Banking to lend $5,000,000 to New England Note upon the security of the certificate of deposit to be issued in the name of Manhattan.

22. On January 23, 1962, Garvin, in furtherance of said scheme, asked C. Joseph Gunter (hereinafter referred to as "Gunter"), Assistant Secretary of Irving Trust, to appear at his office the next morning with a check of Irving Trust for $5,000,000 payable to Bankers Life and told Gunter that Irving Trust would receive securities on January 24, 1962, to provide the funds for this check.

23. On January 24, 1962, Begole, in the presence of Bourne, Sweeny, Gunter and Garvin, executed two notes totalling $5,250,000, payable to New England Note. One note was in the sum of $5,000,000 and bore interest at the rate of 7½%; the second note was in the amount of $250,000 and bore interest at the rate of 5%. Begole also executed an assignment of the shares of Manhattan to New England Note.

24. On the morning of January 24, 1962, in the presence of Begole, Sweeny and Garvin, at the office of Manhattan,

Gunter delivered the Irving Trust check for $5,000,000, payable to Bankers Life, to Leo Lehane, Executive Vice-President of Bankers Life.

25. Immediately thereafter, in furtherance of said scheme to defraud, Begole called a stockholders meeting, at which Begole and Sweeny were elected Directors of Manhattan. A Board of Directors meeting was then called for the election of officers for Manhattan. Begole was elected Chairman of the Board and Sweeny was elected President. The Board of Directors then adopted a resolution authorizing the sale of $5,155,000 in United States Government securities, the property of Manhattan and the purchase of a 3% Certificate of Deposit in the amount of $5,000,000 from BA Trust.

26. Shortly thereafter, on January 24, 1962, the aforementioned United States Government securities, the property of Manhattan, were transferred through Garvin Bantel to Irving Trust. They were sold later that day to Second District Securities Company for the account of Manhattan by Garvin, Bantel and delivered by Irving Trust to the purchaser. The proceeds of $4,854,552.67 together with other transfers of cash in the amount of $150,000 were credited to an account in the name of Manhattan at Irving Trust, who charged the $5,000,000 payment to Bankers Life against these funds.

27. Later that day, at the request of Garvin Bantel, Gunter brought to the offices of BA Trust another check of Irving Trust in the amount of $5,000,000, payable to the order of BA Trust. There, he delivered it to Sweeny who turned it over to Paul Sandrisser, Vice-President of

BA Trust who thereupon issued a certificate of deposit, in the name of Manhattan for $5,000,000 payable in six months, accepting the Irving Trust check in payment. Sweeny, as President and Milton Katz, as Assistant Treasurer of Manhattan, at the insistence of Sandrisser, endorsed the certificate of deposit to New England Note. Bourne, as President of New England Note, endorsed the certificate of deposit over to BA Banking as collateral security on a six month loan of $5,000,000 made by BA Banking to New England Note. A check of BA Banking in the sum of $5,000,000 representing the proceeds of this loan was then turned over to Gunter, in repayment of the $5,000,000 Irving Trust check given to BA Trust to purchase the certificate of deposit. At the same time BA Banking made another loan to New England Note in the sum of $250,000, which was secured by the aforementioned outstanding shares of Manhattan. This sum was deposited by New England Note in BA Trust and was disbursed, in part, as follows: Garvin, Bantel—$25,000; Begole—$50,000; Bourne—$50,000; BA Banking—$100,000.

28. Between January 24 and January 29, 1962, a series of entries were made on the books of Irving Trust for the purpose of concealing the transactions alleged in paragraphs 22, 23, 24, 26 and 27.

29. On or about January 29, 1962, for the purpose of concealing the transactions referred to in paragraphs 22, 23, 24, 26 and 27, Garvin, at the request of Irving Trust, obtained backdated letters signed by Bourne.

30. For the purpose of concealing the above transactions Sweeny, as President of Manhattan certified to the New

York State Insurance Department in Manhattan's quarterly financial statements, for the period ending March 31, 1962, and June 30, 1962, that Manhattan had on deposit at BA Trust, the sum of $5,000,000. These financial statements failed to reveal that the said $5,000,000 deposit at BA Trust was in any way encumbered or impaired.

31. On July 24, 1962, the aforementioned certificate of deposit, the loans made by BA Banking to New England Note, and the loans made by New England Note to Begole, matured. As part of the scheme to defraud and in furtherance thereof, BA Trust issued a new certificate of deposit in the amount of $5,000,000 in the name of Manhattan payable on January 24, 1963. This was endorsed by Sweeny, as Treasurer, and Begole, as Chairman, of Manhattan. The Begole and New England Note loans were extended to January 24, 1963. On July 24, 1962, Begole, advised BA Trust that the new $5,000,000 certificate of deposit and all of Manhattan's outstanding shares, collateralized the extended $5,000,000 loan to New England Note.

32. To further conceal the aforementioned transactions, Sweeny as President of Manhattan certified to the New York State Insurance Department in Manhattan's quarterly financial statement for the period ending September 30, 1962, and in Manhattan's annual financial statement for 1962, that Manhattan had on deposit at BA Trust, the sum of $5,000,000. These financial statements failed to reveal that the said $5,000,000 deposit at BA Trust was in any way encumbered or impaired.

33. As a result of all of the aforementioned acts of concealment, Manhattan, its creditors, policyholders and the New York State Insurance Department were misled in that

in fact this asset of Manhattan's the $5,000,000 certificate of deposit issued by BA Trust was encumbered.

34. On January 21, 1963, Begole at the request of Bourne and Garvin, instructed Irving Trust to issue $5,500,000 in bearer certificates of deposit for the account of Manhattan and directed that they be delivered against payment to Garvin Bantel. On January 22, 1963, Marine Midland Trust Company of New York (hereinafter referred to as "Marine Midland") loaned Garvin Bantel $5,500,000 on the security of the aforementioned bearer certificates of deposit and the proceeds of this loan were delivered to Irving Trust in payment for the said bearer certificates of deposit.

35. On January 23, 1963, in furtherance of the aforesaid scheme to defraud, Sweeny, Begole, Garvin and Sandrisser agreed that the proceeds of Manhattan's $5,500,000 certificates of deposit at BA Trust would be used to liquidate the New England Note loan at BA Banking.

36. On January 25, 1963, BA Trust credited Manhattan with $5,075,616.44, the proceeds of the BA Trust certificate of deposit payable to Manhattan, as well as $515,361.18 the proceeds of the certificate of deposit issued by the First National Bank of Boston payable to Manhattan. At the direction of Sweeny, B. A. Trust issued its check to Irving Trust in the sum of $5,500,000 and charged Manhattan's account. Irving Trust, at the direction of Garvin Bantel credited this check to the account of Garvin Bantel. Against this credit of the $5,500,000 check and at the direction of Garvin Bantel, Irving Trust debited Garvin Bantel's account for a check in the sum of $5,250,000. This check was issued to B. A. Banking which applied it in payment of the outstanding New England Note loans.

37. On April 18, 1963, B. A. Banking delivered to Begole and Sweeny the shares of stock of Manhattan registered in the name of Begole.

38. In furtherance of the aforesaid scheme to defraud, on May 15, 1963, Irving Trust certified to the New York State Insurance Department that Manhattan had on deposit at Irving Trust the sum of $5,500,000 evidenced by the certificates of deposit described in paragraph 34 hereof and further certified the said certificates were free of all liens, claims, or encumbrances, and were not held as security for any loans.

39. On or about August 22, 1963, Marine Midland applied the proceeds of the certificates of deposit described in paragraph 34 hereof, to the satisfaction of the loan from Marine Midland to Garvin Bantel.

40. By reason of the foregoing acts, the defendants herein did unlawfully conspire and in furtherance thereof did employ a device scheme and artifice whereby the assets of Manhattan have been depleted and plaintiff, as Liquidator of Manhattan, and the creditors and policyholders of Manhattan have been damaged to the extent of $5,500,000.

As and for a Second Cause of Action Against the Defendant Irving Trust Company, Plaintiff Alleges on Information and Belief:

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 26.

42. Manhattan instructed Irving Trust on January 24, 1962, to receive the aforementioned United States Govern-

ment securities, the property of Manhattan, to deliver them against the proceeds of the sale and to credit the proceeds of the sale, together with Manhattan's aforementioned transfers of cash in the amount of $150,000, to Manhattan's account at Irving Trust.

43. On January 24, 1962, Irving Trust credited the proceeds of the sale of Manhattan's United States Government securities and Manhattan's transfers of cash to an account in that bank, in the name of Manhattan.

44. Irving Trust, by debiting the check for $5,000,000 it had issued to Bankers Life to this account of Manhattan's against the proceeds of Manhattan's United States Government securities and the transfers of cash, did so without authority and without instructions from Manhattan.

45. Plaintiff has made due demand of Irving Trust for the surrender and delivery to Plaintiff of the aforesaid assets of Manhattan, but Irving Trust refused and still refuses to do so, and has unlawfully converted and disposed of the aforesaid assets of Manhattan, to its own use and benefit all to the damage of plaintiff as Liquidator of Manhattan, and the creditors and policyholders of Manhattan, in the sum of $5,000,000.

As and for a Third Cause of Action Against the Defendant Irving Trust Company, Plaintiff Alleges on Information and Belief:

46. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 26.

47. On January 24, 1962, Manhattan opened a bank account with and became a depositor of Irving Trust, under

the customary and ordinary rules and regulations applicable to banking institutions.

48. Irving Trust promised and agreed, among other things, to hold moneys deposited to Manhattan's account and to repay said moneys upon proper order of Manhattan.

49. On January 24, 1962, Gunter at the direction of Garvin, had an Irving Trust check issued, to the order of Bankers Life, for $5,000,000. Gunter then, at a closing held at the offices of Manhattan, delivered this check to officers of Bankers Life. Gunter knew that this check represented the purchase price being paid to Bankers Life, on its sale of 100% of the outstanding stock of Manhattan to Begole.

50. Manhattan instructed Irving Trust on January 24, 1962, to receive the aforementioned United States Government securities, the property of Manhattan, to deliver them against the proceeds of the sale, and to credit the proceeds of the sale, together with Manhattan's aforementioned transfers of cash to an account in that bank, in the name of Manhattan.

51. On January 24, 1962, Irving Trust credited the proceeds of the sale of Manhattan's United States Government securities and Manhattan's transfers of cash to an account in that bank, in the name of Manhattan.

52. Later that day, at the direction of Garvin, Irving Trust debited the $5,000,000 check to Bankers Life to this account of Manhattan's against the proceeds of Manhattan's United States Government securities and the aforementioned transfers of cash.

53. Irving Trust, by debiting the check for $5,000,000 it had issued to Bankers Life to this account of Manhattan's, did so knowing that Garvin was neither an officer, director, employee or agent of Manhattan and that this check to Bankers Life was for a non-corporate purpose of Manhattan. These facts put Irving Trust on inquiry, which it failed to make of Manhattan, which would have disclosed that Garvin was not authorized to act on behalf of Manhattan and that the debit to Manhattan's account of the $5,000,000 check to Bankers Life, was not authorized by Manhattan.

54. The Irving Trust check for $5,000,000 payable to Bankers Life, was so debited to Manhattan's account at Irving Trust, solely because of the negligence of Irving Trust and without any negligence on the part of Manhattan contributing thereto.

55. Plaintiff has made due demand of Irving Trust for the payment of the said sum of $5,000,000 but Irving Trust refused and still refuses to do so, and there is now due and owing to Plaintiff as Liquidator of Manhattan from Irving Trust the said sum of $5,000,000.

As and for a Fourth Cause of Action Against the Defendants, Belgium American Bank & Trust Co., Belgian American Banking Corp., and Irving Trust Company, Plaintiff Alleges on Information and Belief:

56. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 39.

57. The $5,000,000 certificate of deposit issued by BA Trust to the order of Manhattan on July 24, 1962, was

the property of Manhattan and represented an asset of Manhattan on deposit at BA Trust.

58. On August 30, 1962, a $500,000 certificate of deposit issued by The First National Bank of Boston to Manhattan representing an asset of Manhattan on deposit at The First National Bank of Boston, was delivered to BA Trust.

59. In or about January 1963, Sweeny, Begole, Garvin Bantel, Garvin, BA Trust, BA Banking and Irving Trust conspired and connived to convert the assets of Manhattan to their own use and benefit.

60. On January 23, 1963, Sweeny, Begole, Garvin and Sandrisser agreed that the proceeds of Manhattan's two certificates of deposit in the amount of $5,500,000 on deposit at BA Trust would be used to liquidate the $5,250,000 loan made by BA Banking to New England Note.

61. In furtherance of said scheme, on January 25, 1963, BA Trust credited Manhattan with $5,075,616.44, the proceeds of the BA Trust certificate of deposit payable to Manhattan, as well as $515,361.18, the proceeds of the certificate of deposit issued by the First National Bank of Boston, payable to Manhattan. At the direction of Sweeny, BA Trust issued its check payable to Irving Trust in the sum of $5,500,000 and charged Manhattan's account. Irving Trust, as part of the aforesaid scheme and at the direction of Garvin Bantel, credited this check for $5,500,000 to the account of Garvin Bantel. Against this credit of $5,500,000 to the account of Garvin Bantel, and at the direction of Garvin Bantel, Irving Trust issued its check payable to

BA Banking in the amount of $5,250,000 and debited Garvin Bantel's account. This check for $5,250,000 was delivered to BA Banking which applied it in full payment of the outstanding loans of New England Note to BA Banking.

62. The defendants, BA Trust, BA Banking and Irving Trust, in applying the proceeds of these two certificates of deposit of Manhattan in payment of New England Note's loans of $5,250,000 to BA Banking, did so without authority or instruction from Manhattan.

63. Plaintiff has made due demand of BA Trust, BA Banking and Irving Trust for the surrender and delivery to plaintiff of the aforesaid assets of Manhattan, but these defendants have refused and still refuse to do so and have unlawfully converted and disposed of the aforesaid assets of Manhattan, to their own use and benefit, all to the damage of plaintiff, as Liquidator of Manhattan, and the creditors and policyholders of Manhattan, in the sum of $5,500,000.

As and for a Fifth Cause of Action Against the Defendants, Belgian American Bank & Trust Co. and Belgian American Banking Corp., Plaintiff Alleges on Information and Belief:

64. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 39.

65. On July 24, 1962, Manhattan opened a bank account with and became a depositor of BA Trust, under the customary and ordinary rules and regulations applicable to banking institutions.

66. BA Trust promised and agreed, among other things to hold moneys deposited to Manhattan's account and to repay said moneys upon proper order of Manhattan.

67. On July 24, 1962, BA Trust issued to the order of Manhattan a $5,000,000 certificate of deposit, which certificate represented an asset of Manhattan on deposit at BA Trust.

68. On July 24, 1962, BA Banking renewed two loans in the amount of $5,250,000 it had previously granted to New England Note. These loans were due and payable on January 24, 1963.

69. On August 30, 1962, a $500,000 certificate of deposit issued by the First National Bank of Boston to Manhattan, representing an asset of Manhattan on deposit at the First National Bank of Boston, was delivered to BA Trust for safekeeping.

70. On January 23, 1963, Sweeney, Begole, Garvin and Sandrisser agreed that the proceeds of Manhattan's two certificates of deposit in the amount of $5,500,000 on deposit at BA Trust would be used to liquidate the New England Note loans at BA Banking.

71. On January 25, 1963, BA Trust credited Manhattan with $5,075,616.44, the proceeds of the BA Trust certificate of deposit payable to Manhattan, as well as $515,361.18 the proceeds of the certificate of deposit issued by the First National Bank of Boston payable to Manhattan. At the direction of Sweeny, BA Trust issued its check payable to Irving Trust in the sum of $5,500,000 and charged Manhattan's account. Irving Trust, at the direction of Garvin

Bantel, credited this check for $5,500,000 to the account of Garvin Bantel. Against this credit of $5,500,000 to the account of Garvin Bantel and at the direction of Garvin Bantel, Irving Trust issued its check payable to BA Banking in the amount of $5,250,000 and debited Garvin Bantel's account. This check for $5,250,000 was delivered to BA Banking which applied it in full payment of the outstanding loans of New England Note to BA Banking.

72. The defendants BA Trust and BA Banking in applying the proceeds of these two certificates of deposit of Manhattan in payment of New England Note's loans in the amount of $5,250,000 did so with the knowledge that the payment of the New England Note's loans by Manhattan was a non-corporate purpose and was a possible misappropriation of Manhattan's assets by officers of Manhattan. These facts put BA Trust and BA Banking on inquiry, which they failed to make of Manhattan, which would have disclosed that the payment of the two loans of New England Note in the amount of $5,250,000 was not authorized.

73. The New England Note loans at BA Banking were paid for out of the assets of Manhattan, solely because of the negligence of BA Trust and BA Banking and without any negligence on the part of Manhattan contributing thereto.

74. Plaintiff has made due demand of BA Trust and BA Banking for the payment of the said sum of $5,500,000 but BA Trust and BA Banking refused and still refuse to do so, and there is now due and owing to plaintiff as Liquidator of Manhattan from BA Trust and BA Banking the said sum of $5,500,000.

WHEREFORE, Plaintiff demands judgment:

(a) On its First Cause of Action, against Bankers Life & Casualty Company, Irving Trust Company, Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin Bantel & Company, New England Note Corporation, George K. Garvin, James F. Begole, John F. Sweeny, and Standish T. Bourne, jointly and severally, for $5,500,000 with interest from the 24th day of January, 1962.

(b) On its Second Cause of Action, against Irving Trust Company for $5,000,000 with interest from the 24th day of January, 1962.

(c) On its Third Cause of Action, against Irving Trust Company for $5,000,000 with interest from the 24th day of January, 1962.

(d) On its Fourth Cause of Action, against Belgian American Bank & Trust Company, Belgian American Banking Corporation and Irving Trust Company, jointly and severally for $5,500,000 with interest from the 25th day of January, 1963.

(e) On its Fifth Cause of Action, against Belgian American Bank & Trust Company and Belgian American Banking Corporation, jointly and severally, for $5,500,000 with interest from the 25th day of January, 1963;

Together with the costs and disbursements of this action, and for such other, further or different relief as to the Court may seem just and proper.

ARNOLD BAUMAN,
Attorney for Plaintiff,
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No. 30 Rockefeller Plaza,
New York, New York 10020.